FILED U.S.

09-763 DEC 28 2009

OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States

DARNIECE BAILEY TURNIPSEED,
RAMON TURNIPSEED, and RAYMOND THOMAS,
individually and on behalf of a class of
all others similarly situated,

Petitioners,

v.

DOROTHY BROWN, Clerk of the Circuit Court of
Cook County in her official capacity, and
THE COUNTY OF COOK,

Respondents.

On Petition For Writ Of Certiorari
To The Illinois Appellate Court

PETITION FOR A WRIT OF CERTIORARI

JOHN R. WYLIE
Counsel of Record
DONALDSON GUIN LLC
300 South Wacker Drive,
Suite 1700
Chicago, Illinois 60606
(312) 878-8391

Attorney for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Pursuant to an ordinance of Defendant County of Cook ("Cook County"), Illinois, Defendant Dorothy Brown, the Clerk of the Circuit Court of Cook County, invests the funds deposited with her by (or on behalf of) accused criminal defendants to secure their release on bail, and then gives the interest to the County. Plaintiffs contend that because bail bond deposits remain the depositor's private property until such time as a court enters a judgment of forfeiture, the interest that accrues on these bail deposits also belongs to them under the common law maxim "interest follows principal," which this Court has recognized in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 101 S. Ct. 446 (1980), and other cases. Therefore, Plaintiffs contend, the County's retention of millions of dollars in such interest is a taking without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution. Plaintiffs further contend that the Cook County ordinance, by effecting the automatic forfeiture of this interest, without any opportunity to contest it, violates the Due Process Clause of the Fourteenth Amendment.

There are two questions presented:

1. Whether Defendants' retention of the money earned on Plaintiffs' bail bond deposits is a taking pursuant to the Fifth and Fourteenth Amendments for which just compensation is due.

QUESTIONS PRESENTED – Continued

2. Whether the immediate and automatic forfeiture of the interest earned by the County on Plaintiffs' private property – the interest earned on their bail bond deposits – violates due process.

PARTIES

Petitioners Darniece and Ramon Turnipseed and Raymond Thomas are individuals suing on behalf of themselves and a class of similarly situated persons. Petitioners were the Plaintiffs and the Appellees in the state court proceedings.

Respondent Dorothy Brown is the Clerk of the Circuit Court of Cook County, Illinois. Respondent County of Cook is a "body politic and corporate" that "may sue and be sued" under Illinois law. 55 ILCS 5/5-1001.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	iii
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	5
A. STATEMENT OF FACTS	6
B. PROCEEDINGS IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS	9
C. THE ILLINOIS APPELLATE COURT DECISION	9
D. THE ILLINOIS SUPREME COURT DECISION	10
REASONS TO GRANT THE WRIT OF CERTIORARI	11
I. THE DECISION OF THE ILLINOIS APPELLATE COURT CONFLICTS WITH THE HOLDING OF THIS COURT IN *HENKELS V. SUTHERLAND* WITH RESPECT TO THE INTEREST EARNED ON PRIVATE PROPERTY HELD BY THE GOVERNMENT	12

TABLE OF CONTENTS – Continued

Page

A. The Decision of the Illinois Appellate Court Conflicts With This Court's Holding in *Henkels v. Sutherland*..... 12

B. The Decision of the Illinois Appellate Court Also Undermines This Court's Holdings in *Webb's*, *Phillips*, and *Brown*..... 15

II. THE COURT SHOULD RESOLVE THE CONFLICT AMONG STATE COURTS THAT HAVE ADDRESSED WHETHER RETAINING THE INTEREST EARNED ON FUNDS DEPOSITED TO SECURE BAIL IS A TAKING FOR WHICH JUST COMPENSATION IS DUE 18

III. THE COURT SHOULD REVIEW THE DECISION OF THE ILLINOIS APPELLATE COURT BECAUSE IT CONFLICTS WITH THE HOLDINGS OF THIS COURT THAT REQUIRE DUE PROCESS BEFORE A PERSON'S PROPERTY INTERESTS MAY BE FORFEITED 20

IV. THIS CASE IS AN EXAMPLE OF THE USE OF PRIVATE PROPERTY BY STATE GOVERNMENTS WITHOUT COMPENSATION, A PRACTICE WHICH SHOULD BE LIMITED BY THIS COURT 22

CONCLUSION 23

TABLE OF CONTENTS – Continued

Page

APPENDIX

Illinois Appellate Court Opinion Dated May 4, 2009 ..... App. 1

Circuit Court of Cook County Opinion Dated August 19, 2008 ..... App. 23

Illinois Supreme Court Denial of Petition for Leave to Appeal Dated September 30, 2009... App. 42

Cook County Ordinance 93-O-45 ..... App. 46

Ill. Const., art. I, § 9 ..... App. 55

725 ILCS 5/110-7 ..... App. 56

Turnipseed, et al. v. Brown, et al., Second Amended Complaint Dated December 18, 2007 ..... App. 62

TABLE OF AUTHORITIES

Page

CASES

A-1 Lithoplate, Inc. v. AFS Publ'g Co., 66 Ill. App. 3d 560, 384 N.E.2d 395 (Ill. App. Ct. 1978) 6

Bennis v. Michigan, 516 U.S. 443, 116 S. Ct. 994 (1996) 14

Brown v. Legal Found. of Wash., 538 U.S. 216, 123 S. Ct. 1406 (2003) 11, 15, 17

Canel v. Topinka, 818 N.E.2d 311 (Ill. 2004) 23

Clark v. Strayhorn, 184 S.W.3d 906 (Tex. App. 2006) 22

Clovis Nat'l Bank v. Calloway, 69 N.M. 119, 364 P.2d 748 (1961) 21

Degen v. United States, 517 U.S. 820, 116 S. Ct. 1777 (1996) 20

Getty Oil Co. v. United States, 767 F.2d 886 (D.C. Cir. 1985) 13

Henkels v. Sutherland, 271 U.S. 298, 46 S. Ct. 524 (1926) ..... *passim*

Hibben v. Smith, 191 U.S. 310, 24 S. Ct. 88 (1903) 20

Hooks v. Treasurer, 961 So. 2d 425 (La. Ct. App. 2007) 22

Morris v. Chiang, 77 Cal. Rptr. 3d 799 (Cal. Ct. App. 2008) 22

Norwalk v. J.P. Morgan & Co., 740 N.Y.S.2d 367 (N.Y. App. Div. 2002) 22

TABLE OF AUTHORITIES – Continued

Page

Phillips v. Wash. Legal Found., 524 U.S. 156, 118 S. Ct. 1925 (1998) 11, 15, 16, 17

Rowlette v. North Carolina, 656 S.E.2d 619 (N.C. Ct. App. 2008) 22

Simon v. Weissman, 301 Fed. Appx. 107 (3d Cir. Dec. 1, 2008) 22

Siroky v. Richland County, 271 Mont. 67, 894 P.2d 309 (1995) 18, 19

Smolow v. Hafer, 959 A.2d 298 (Pa. 2005) 22

Smyth v. Carter, 845 N.E.2d 219 (Ind. Ct. App. 2006) 22

Sogg v. Zurz, 905 N.E.2d 187 (Ohio 2009) 22

State v. Otis Elevator Co., 12 N.J. 1, 95 A.2d 715 (1953) 21

State v. Phoenix Sav. Bank & Trust Co., 60 Ariz. 138, 132 P.2d 637 (1942) 21

State v. Sav. Union Bank & Trust Co., 186 Cal. 294, 199 P. 26 (1921) 21

State v. Sec. Sav. Bank, 186 Cal. 419, 199 P. 791 (1921) 21

Suever v. Connell, 579 F.3d 1047 (9th Cir. 2009) 22

Turnacliff v. Westly, 546 F.3d 1113 (9th Cir. 2009) 22

Turnipseed v. Brown, 391 Ill. App. 3d 88, 908 N.E.2d 546 (Ill. App. Ct. 2009) 1

Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 101 S. Ct. 446 (1980) 11, 15, 16, 17, 19

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V 2, 5, 11, 17, 22

U.S. Const. amend. XIV, § 1 ..... 2, 5, 11, 17

Ill. Const., art. I, § 9 ..... 2, 6

STATUTES AND ORDINANCES

28 U.S.C. § 1257(a) 2

725 ILCS 5/110-7 ..... 3, 4, 6, 7, 21

Cook County Ordinance No. 93-O-45 3

PETITION FOR A WRIT OF CERTIORARI

Darniece and Ramon Turnipseed and Raymond Thomas petition for a writ of certiorari to review the opinion and judgment of the Illinois Appellate Court issued on May 4, 2009. That court's decision reversed the Circuit Court of Cook County, which had held that the Defendants' retention of interest earned on funds deposited to secure bail, without compensation, violated the Fifth and Fourteenth Amendments, and which, based on that holding, had granted summary judgment in favor of the Plaintiffs and against the Defendants. On September 30, 2009, the Illinois Supreme Court declined to review the decision of the Illinois Appellate Court.

OPINIONS BELOW

The opinion and judgment of the Circuit Court of Cook County, Illinois, is unreported and reprinted in the Appendix. Pet. App. at 23-41. The opinion of the Illinois Appellate Court reversing the Circuit Court's decision in Plaintiffs' favor is reported as *Turnipseed v. Brown*, 391 Ill. App. 3d 88, 908 N.E.2d 546 (Ill. App. Ct. 2009), and is reprinted in the Appendix. Pet. App. at 1-22. The order of the Illinois Supreme Court denying discretionary review of the opinion and judgment of the Illinois Appellate Court is unreported and is reprinted in the Appendix. Pet. App. at 42-45.

JURISDICTION

The Illinois Supreme Court denied discretionary review of the Illinois Appellate Court's opinion and judgment on September 30, 2009. Pet. App. at 42-45. This Court's certiorari jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of the Fifth Amendment to the United States Constitution state:

> [N]or shall [any person] be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

The relevant provisions of the Fourteenth Amendment to the United States Constitution state:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

U.S. Const. amend. XIV, § 1.

The relevant portion of Article I, § 9 of the Illinois Constitution states that "[a]ll persons shall be bailable by sufficient sureties. . . ." Ill. Const., art. I, § 9.

The relevant portion of Cook County Ordinance No. 93-O-45 states:

> All elected and appointed officials of Cook County are directed to invest public funds in their possession or for which they are custodians in interest-bearing accounts. . . .

Cook County Ordinance No. 93-O-45, § 34-(b) (Nov. 16, 1993).

The relevant portions of the Illinois Code of Criminal Procedure state:

> When the conditions of the bail bond have been performed and the accused has been discharged from all obligations in the cause the clerk of the court shall return to the accused or to the defendant's designee by an assignment executed at the time the bail amount is deposited, unless the court orders otherwise, 90% of the sum which had been deposited and shall retain as bail bond costs 10% of the amount deposited. However, in no event shall the amount retained by the clerk as bail bond costs be less than $5.

725 ILCS 5/110-7(f).

> If the accused does not comply with the conditions of the bail bond the court having jurisdiction shall enter an order declaring the bail to be forfeited. Notice of such order of forfeiture shall be mailed forthwith to the accused at his last known address. If the accused does not appear and surrender to the court having jurisdiction within 30 days from

> the date of the forfeiture or within such period satisfy the court that appearance and surrender by the accused is impossible and without his fault the court shall enter judgment for the State if the charge for which the bond was given was a felony or misdemeanor, or if the charge was quasi-criminal or traffic, judgment for the political subdivision of the State which prosecuted the case, against the accused for the amount of the bail and costs of the court proceedings; however, in counties with a population of less than 3,000,000, instead of the court entering a judgment for the full amount of the bond the court may, in its discretion, enter judgment for the cash deposit on the bond, less costs, retain the deposit for further disposition or, if a cash bond was posted for failure to appear in a matter involving enforcement of child support or maintenance, the amount of the cash deposit on the bond, less outstanding costs, may be awarded to the person or entity to whom the child support or maintenance is due.

725 ILCS 5/110-7(g).

The entire text of Article I, § 9 of the Illinois Constitution, the Cook County Ordinance, and 725 ILCS 5/110-7 are reprinted in the Appendix. Pet. App. at 46-61.

STATEMENT OF THE CASE

This petition asks the Court for a writ of certiorari to review the decision of the Illinois Appellate Court, which, contrary to this Court's established precedent, sanctions the taking of private property without compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution. The Illinois Appellate Court's decision hinges on the notion that absent a specific "agreement" or statutory entitlement to interest, an owner has no claim for the uncompensated taking of interest earned on his or her private funds while held in custody by a governmental entity. Under this Court's decisions, however, a lack of agreement to pay interest is irrelevant. *See Henkels v. Sutherland,* 271 U.S. 298, 46 S. Ct. 524 (1926), and *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 101 S. Ct. 446 (1980). Under those cases, an owner of private funds held by the government has an existing property right in the interest that accrues on that property, and compensation must be paid if the government takes it, even where there is no statute requiring it and even where the government has not "agreed" to do so.

A rule that compensation need not be paid in the absence of an agreement or statute requiring it would eviscerate the Takings Clause by, in effect, allowing a government to opt out of its prohibition simply by failing to agree or enact a statute. The Illinois Appellate Court's decision also conflicts with other decisions of this Court holding that the government may not forfeit private property without due process

and with a contrary decision of the Montana Supreme Court. Finally, the Court should review the Illinois Appellate Court decision because it represents an example of a trend among states to use private property without paying just compensation. For the reasons set forth here, Plaintiffs ask the Court to issue a writ of certiorari.

A. Statement of Facts

Article I, § 9 of the Illinois Constitution guarantees the right to bail, providing that "[a]ll persons shall be bailable by sufficient sureties. . . ." The deposit of "sufficient sureties" for bail is governed by the Illinois Code of Criminal Procedure, 725 ILCS 5/110-1 *et seq*. Pursuant to 725 ILCS 5/110-7, a person for whom bail has been set may obtain release by executing a bail bond and depositing 10% of the bail amount with the clerk of the court. 725 ILCS 5/110-7(a). The clerk holds bail deposits "under authority of the court." *A-1 Lithoplate, Inc. v. AFS Publ'g Co.*, 66 Ill. App. 3d 560, 562, 384 N.E.2d 395, 396 (Ill. App. Ct. 1978). In other words, the deposits remain private property.

When "the accused has been discharged from all obligations in the cause," and has otherwise satisfied the conditions of his or her bail, the clerk is statutorily required to return 90% of the amount deposited and to retain "as bail bonds costs" the other 10% deposited with a minimum of $5 under 725 ILCS 5/110-7(f). *See* Second Amended Complaint ("SAC") ¶ 10, Pet. App. at 66. If, on the other hand, the person

fails to meet the conditions of the bail bond, e.g., fails to appear for trial, the court may enter an order of forfeiture, and the state's attorney may then seek a judgment of forfeiture of the deposit and for the balance of the bond amount under 725 ILCS 5/110-7(g). SAC ¶ 11, Pet. App. at 66.

As the Circuit Court of Cook County held, at all times prior to the entry of a judgment of forfeiture, Defendant Brown's possession of the funds is purely custodial; the deposited funds remain private property. Pet. App. at 35-36. Acting pursuant to Cook County Ordinance 93-O-45, Defendant Brown places bail deposits in interest-bearing instruments at local banks. SAC ¶ 12, Pet. App. at 66. She also, again acting under authority of the Cook County ordinance, keeps the interest earned on the Plaintiffs' and others' bail money, in addition to the statutorily authorized 10% of the amount deposited, and then gives that interest to the County. SAC ¶ 1, Pet. App. at 63.

On February 2, 2002, the Turnipseed Plaintiffs posted a cash deposit as bond for the bail set for Darniece Turnipseed, who had been arrested for a minor offense. SAC ¶ 21, Pet. App. at 70. Defendant Brown placed the Turnipseeds' funds in an interest-bearing account. SAC ¶ 12, Pet. App. at 66. On April 3, 2002, the court dismissed all charges against Darniece Turnipseed for want of prosecution, and Defendant Brown returned to Mr. and Mrs. Turnipseed the amount they deposited as bond, minus 10%. SAC ¶ 23, Pet. App. at 70. The Clerk transferred the interest earned on their bail deposits to Defendant Cook County. *Id.*

On December 17, 2003, Plaintiff Thomas posted a cash deposit of $17,500 as bond for the $175,000 bail set for his brother. SAC ¶ 24, Pet. App. at 70. On November 22, 2005, nearly two years later, all of the conditions for bond having been satisfied, Defendant Brown returned $15,750 to Mr. Thomas, that is, the $17,500 posted minus 10%. SAC ¶ 25, Pet. App. at 70-71.[1] Defendant Brown kept the interest earned on Mr. Thomas's $17,500 bail deposit and transferred that interest to Defendant Cook County. *Id.*

Plaintiffs allege that while Defendants held their property, Defendants invested it, and it "accrued earnings." SAC ¶ 1, Pet. App. at 63. Because bail bond deposits remain private property unless and until a court enters a judgment of forfeiture, Plaintiffs contend, so too is the interest that accrued. That being so, Defendants violated the Takings Clauses of the Federal and Illinois Constitutions when they failed to return the interest to the Plaintiffs along with the balance of their deposits without just compensation.

---

[1] The Illinois Appellate Court expressed some confusion as to whether the bail deposit was returned to Raymond Thomas or his brother, for whom the deposit was made. Pet. App. at 4. It was returned to Plaintiff Raymond Thomas.

B. Proceedings in the Circuit Court of Cook County, Illinois

The Turnipseed Plaintiffs filed their Complaint on October 18, 2004, against Defendant Brown, and later amended it to add Cook County as an additional Defendant. They amended their Complaint a second time to add Mr. Thomas as an additional Plaintiff.

The Second Amended Complaint alleged two counts. Count I was brought pursuant to the Fifth and Fourteenth Amendments to the United States Constitution and Article I, § 15 of the Illinois Constitution. Count II was brought pursuant to 42 U.S.C. § 1983.

Defendants moved to dismiss Plaintiffs' Second Amended Complaint, and Plaintiffs moved for class certification. On August 18, 2008, the Circuit Court granted Plaintiffs' motion for class certification and denied the motion to dismiss, finding that because at all times before forfeiture bail deposits remain private property, the interest earned on Plaintiffs' and the class's bail deposits was also private property. Pet. App. at 23-41. As a result, the Circuit Court held, the Defendants' retention of that interest without compensation violated the Takings Clauses of the Illinois and Federal Constitutions. Pet. App. at 36.

C. The Illinois Appellate Court Decision

On October 16, 2008, the Appellate Court granted Defendants' petition for discretionary interlocutory

appeal only insofar as it pertained to the Circuit Court's order certifying the class.

The Appellate Court nonetheless proceeded to address the merits of Plaintiffs' claims and on May 4, 2009, held as follows:

> [P]laintiffs have not stated a valid claim for interest. First, the statute is silent, and silence indicates that the legislature did not intend to confer a statutory right to recover interest. Second, plaintiffs have no common law right to recover interest. Since plaintiffs have no right to the interest, there can be no taking of it.

Based on its conclusion that Plaintiffs had no property right to the interest on their bail bond deposits, and so no claim for just compensation, the Appellate Court reversed the Circuit Court's order certifying the class, as well as its denial of the Defendants' motion to dismiss. Pet. App. at 1-22. Neither party sought rehearing.

D. The Illinois Supreme Court Decision

Plaintiffs petitioned the Illinois Supreme Court for leave to appeal the decision of the Illinois Appellate Court. On September 30, 2009, the Illinois Supreme Court declined to hear the case. Pet. App. at 42-45.

REASONS TO GRANT THE WRIT OF CERTIORARI

The Illinois Appellate Court held that Plaintiffs could not state a claim under the Takings Clauses of the Federal or Illinois Constitutions because "there is no statute or contract which gave plaintiffs a right to the interest." Pet. App. at 15. That holding directly contradicts the holding of this Court in *Henkels v. Sutherland*, 271 U.S. 298, 46 S. Ct. 524 (1926), as well as its holdings in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 101 S. Ct. 446 (1980), *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 118 S. Ct. 1925 (1998), and *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 123 S. Ct. 1406 (2003).

By sanctioning the government's uncompensated use of private property, the Illinois Appellate Court decision strikes at the heart of the Fifth Amendment's Takings Clause. It also strikes at the heart of the Due Process Clause of the Fourteenth Amendment by sanctioning the automatic forfeiture of private property, permitting Cook County and its Treasurer to keep private property – the interest earned on bail bond deposits – without recourse to its owner. Finally, the Illinois court's decision is part of a trend in which state governments use private property without paying just compensation. For the reasons below, this Court should issue its writ of certiorari.

I. THE DECISION OF THE ILLINOIS APPELLATE COURT CONFLICTS WITH THE HOLDING OF THIS COURT IN *HENKELS V. SUTHERLAND* WITH RESPECT TO THE INTEREST EARNED ON PRIVATE PROPERTY HELD BY THE GOVERNMENT.

A. The Decision of the Illinois Appellate Court Conflicts With This Court's Holding in *Henkels v. Sutherland*.

In *Henkels v. Sutherland*, the Court faced a question remarkably similar to the one presented here. There, the plaintiff sued to recover the proceeds of stock that had been seized from him and later sold by the Alien Property Custodian pursuant to the Trading with the Enemy Act. *Henkels*, 271 U.S. at 298-99, 46 S. Ct. at 525. During the period of custody, and pursuant to an Executive Order, the Secretary of the Treasury invested the proceeds in interest-bearing U.S.-issued securities "for account of the Alien Property Custodian." *Id.*, 271 U.S. at 300, 46 S. Ct. at 525. After the lower court adjudged the plaintiff the owner of the sale proceeds, the United States Treasurer paid the plaintiff the proceeds, minus certain expenses, but did not give him the accumulated interest. *Id.*, 271 U.S. at 299, 46 S. Ct. at 525.

The District Court denied the plaintiff's request to recover his interest, and the Court of Appeals affirmed, holding that "the United States was not

liable for income resulting from an investment of the funds in its own securities." *Id.*

This Court reversed. The Court noted that while "[t]he government cannot be sued without its consent," and so "cannot be sued for interest unless it consents to be liable therefor . . . the claim here is not for interest to be paid by the United States in the sense of the rule." *Id.*, 271 U.S. at 301, 46 S. Ct. at 526. Therefore, the Court held:

> With enemy-owned property seized by the Custodian, it has been held, the United States may deal as it sees fit; but it has no such latitude in respect of the property of an American citizen [such as Henkels]. Whether the government shall pay interest upon its obligations depends upon congressional assent; but it cannot confiscate the actual increment of property belonging to a citizen, or the increment of the proceeds into which such property has been converted, any more than it can confiscate the property or its proceeds, without coming into conflict with the Constitution.

Id.[2]

---

[2] In *Getty Oil Co. v. United States*, 767 F.2d 886, 888 (D.C. Cir. 1985), the court explained:

> When Henkels established his right to the stock, the Supreme Court held that that included the right to the interest earned on the proceeds from the stock,

(Continued on following page)

The Illinois Appellate Court's holding flaunts the rule laid down in *Henkels*, ignoring the crucial distinction drawn there between an owner's right to the interest earned by use of her property while it is held by the government and the payment of interest. The Constitution requires that the government pay compensation if it has, as here, taken that interest for itself.[3] Under the Illinois Appellate Court's ruling, however, the government would be allowed to use private funds in its custody to earn interest, and keep that interest with impunity, simply by failing to agree to pay interest and failing to enact a statute requiring it. This clearly conflicts with *Henkels*, and would sanction the Defendants "coming into conflict with the Constitution." This Court should issue a writ of certiorari to review and correct the Illinois Appellate Court's erroneous and overreaching interpretation of the Takings Clause of the Federal Constitution.

---

carefully distinguishing this from the typical interest-on-a-government-obligation claim.

[3] While the government may, in its exercise of the police power, confiscate private property without compensation when to do so promotes the public health, safety, and welfare, *see, e.g.*, *Bennis v. Michigan*, 516 U.S. 443, 452-53, 116 S. Ct. 994, 1001 (1996), this is not such a case. The forfeiture of the Plaintiffs' property here – the interest earned on their bail deposits – cannot reasonably be said to prevent a threat to public health or safety, a nuisance, or immorality. Rather, it is a simple taking of private property, for which compensation must be paid.

B. The Decision of the Illinois Appellate Court Also Undermines This Court's Holdings in *Webb's*, *Phillips*, and *Brown*.

The Illinois Appellate Court's decision also directly conflicts with this Court's decisions in *Webb's*, *Phillips*, and *Brown*. In each of those cases, this Court held that interest earned on private property is itself private property, which the government cannot retain without compensating its owner.

In *Webb's*, as in this case, money was deposited with the clerk of the court, there to initiate an interpleader action. *Webb's*, 449 U.S. at 156-57, 101 S. Ct. at 448. The clerk in *Webb's*, pursuant to ordinance, as is also the circumstance here, invested the funds and earned interest while holding the principal in custody, and retained the accrued interest upon return of the principal to its proper owners after the interpleader was finished. *Id.*, 449 U.S. at 158, 101 S. Ct. at 449.

The Court stated that "[t]his Court has been permissive in upholding governmental action that may deny the property owner of some beneficial use of his property or that may restrict the owner's full exploitation of the property, if such public action is justified as promoting the general welfare." *Id.*, 449 U.S. at 63, 101 S. Ct. at 452. The Court held, however, the defendant's retention of the accrued interest was "a forced contribution to general governmental revenues, and it is not reasonably related to the costs of using the courts." *Id.* That, the Court concluded, was constitutionally improper.

> Neither the Florida legislature by statute, nor the Florida courts by judicial decree, may accomplish the result the county seeks simply by recharacterizing the principal as "public money" because it is held temporarily by the court. The earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property. The state statute has the practical effect of appropriating for the county the value of the use of the fund for the period in which it is held in the registry.
>
> * * *
>
> To put it another way, a State, by *ipse dixit*, may not transform private property into public property without compensation, even for the limited duration of the deposit in court. This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of governmental power.

Id., 449 U.S. at 164, 101 S. Ct. at 452; *see also Phillips*, 524 U.S. at 172, 118 S. Ct. at 1934 (holding that interest earned on private funds held in Interest On Lawyers Trust Account pursuant to state statute was itself private property); *Brown*, 538 U.S. at 235-240, 123 S. Ct. at 1419-21 (holding statute that commanded interest earned on a Washington IOLTA account be used to fund indigent legal services

worked a taking under the Fifth and Fourteenth Amendments).[4]

The Cook County ordinance that compels Treasurer Brown to keep the millions of dollars in interest she earns on the Plaintiffs' and other class members' bail deposits – Cook County is the largest integrated court system in the nation – accomplishes exactly what this Court has forbidden in *Webb's*, *Brown*, and *Phillips*. In effect, the ordinance and Clerk Brown's actions in conformity with it together operate to automatically turn Plaintiffs' and the other class members' deposits into county property, without any compensation being paid to them: it "appropriate[s] for the County the value of the use of the fund," and "transform[s] private property into public property without compensation," as in *Webb's*.

This Court should issue a writ of certiorari in order to correct the Illinois Appellate Court's erroneous and unconstitutional holding and give meaning to this Court's repeated pronouncements that private

---

[4] In *Brown*, the Court held that the Washington IOLTA statute was not unconstitutional because, by its express terms, the interest earned on the funds properly deposited in such an account could never be higher than the costs associated with returning that interest to its owner. *Brown*, 538 U.S. at 237-40, 123 S. Ct. at 1419-21. Here, because the banks in which the bail deposits are placed pay only "net" interest to the Defendants, any costs have already been subtracted by the banks when the amounts earned are tendered to the Defendants. In any event, the amount of just compensation is not at issue at this stage of the case.

property, including money, cannot be conscripted into the government's use without compensation.

II. THE COURT SHOULD RESOLVE THE CONFLICT AMONG STATE COURTS THAT HAVE ADDRESSED WHETHER RETAINING THE INTEREST EARNED ON FUNDS DEPOSITED TO SECURE BAIL IS A TAKING FOR WHICH JUST COMPENSATION IS DUE.

The Illinois Appellate Court's decision is directly contrary to the decision of the Montana Supreme Court in *Siroky v. Richland County*, 271 Mont. 67, 894 P.2d 309 (1995). In *Siroky*, as here, the plaintiff claimed that interest earned on money deposited to secure his release from custody was his private property and that the county had no right to keep it. *Id.* at 310. The defendants raised the same "contractual" defense asserted by the Defendants here: that the plaintiff "voluntarily chose to deposit a cash bond . . . to satisfy the condition of his bail," and the "contract" thus established neither provided for the earning of interest nor determined who was "entitled to the interest [that was] generated . . . during the time of deposit." *Id.* at 310.

The Montana Supreme Court ruled in favor of the plaintiff notwithstanding the state's contention that it was not contractually or statutorily required to pay interest. Noting first that the deposited funds themselves were private property, even while held in custody by the government, the court stated,

> The bond money was [plaintiff] Sack's private property and could only be lost upon a forfeiture resulting from a violation of the terms of the bond. That did not happen. Rather, the bond was exonerated.

Id. at 312.[5] Therefore, the Montana Supreme Court held, relying on *Webb's*, the interest earned on the bond money was also Sack's private property, and its retention by the county was a compensable taking.

> We hold that the constitutional analysis in *Webb's [Fabulous] Pharmacies* is persuasive. The money deposited was Sack's private property at all times. The retention of earned interest on that money would amount to a taking of Sack's property in violation of the 5th and 14th Amendments of the United States Constitution and Article II, Section 29 of the Montana Constitution.

Id. at 312.

Thus, the courts of two states, Illinois and Montana, faced with identical facts, came to diametrically opposed decisions with respect to claims arising under the Taking Clause of the Federal Constitution.

---

[5] Using language quite similar to this Court's in *Henkels*, the Montana Supreme Court held in *Siroky* that "the County is no more entitled to retain the interest on this cash bond than it would be to retain accruing dividends on a deposit of stock or bonds or the appreciated value of a pledge of real estate. . . ." *Id.* at 313.

This is further reason for this Court to grant a writ of certiorari.

III. THE COURT SHOULD REVIEW THE DECISION OF THE ILLINOIS APPELLATE COURT BECAUSE IT CONFLICTS WITH THE HOLDINGS OF THIS COURT THAT REQUIRE DUE PROCESS BEFORE A PERSON'S PROPERTY INTERESTS MAY BE FORFEITED.

This Court has held repeatedly that the government may not cause the summary forfeiture of private property rights. "In an ordinary case a citizen has a right to contest the forfeiture of his property, a right secured by the Due Process Clause." *Degen v. United States*, 517 U.S. 820, 822, 116 S. Ct. 1777, 1780 (1996).[6]

Under the decision of the Illinois Appellate Court, however, an owner forfeits his property right, as secured by the Takings Clause, automatically and immediately, and without notice or recourse, when he determines to avail himself of his constitutional right to bail. Under that interpretation the owner of the deposit has no way to challenge the loss of his or her

---

[6] Although *Degen* involved a claim against the United States, and so involved the Due Process Clause of the Fifth Amendment, the Fourteenth Amendment's Due Process Clause provides the same protection against actions of the state and local governments. *Hibben v. Smith*, 191 U.S. 310, 325, 24 S. Ct. 88, 92 (1903).

property, nor is the County required to prove the facts necessary to support its forfeiture, as it is required for the forfeiture of the deposit itself. *See* 725 ILCS 110-7(g). Thus, following the Illinois Appellate Court's decision, an owner would lose his property right to the interest earned on his private property even when he has not violated his bail conditions, and the County would thus be unable to obtain a judgment of forfeiture of the principal amount deposited.

In this regard, the Illinois Appellate Court's ruling also conflicts with the Supreme Courts of at least four states, each of which has held the immediate and irrevocable loss of property rights without due process protections to be an unconstitutional exercise of the state's power. *See State v. Sav. Union Bank & Trust Co.*, 186 Cal. 294, 199 P. 26 (1921); *State v. Sec. Sav. Bank*, 186 Cal. 419, 199 P. 791 (1921), *aff'd Sec. Sav. Bank v. State*, 263 U.S. 282 (1923); *State v. Phoenix Sav. Bank & Trust Co.*, 60 Ariz. 138, 132 P.2d 637 (1942); *Clovis Nat'l Bank v. Calloway*, 69 N.M. 119, 364 P.2d 748 (1961); *State v. Otis Elevator Co.*, 12 N.J. 1, 95 A.2d 715 (1953).

By sanctioning the summary deprivation of property rights, the Illinois Appellate Court's holding directly conflicts with this Court's holdings that due process prohibits such an automatic deprivation, as well the holdings of other state courts. For this reason as well, the Court should issue a writ of certiorari to review the propriety of that scheme.

IV. THIS CASE IS AN EXAMPLE OF THE USE OF PRIVATE PROPERTY BY STATE GOVERNMENTS WITHOUT COMPENSATION, A PRACTICE WHICH SHOULD BE LIMITED BY THIS COURT.

The use of private property by a local government exemplified in this case is merely one example of cash-starved state entities' attempts to circumvent the strictures of the Fifth Amendment. Unclaimed property statutes of the various states are another example. In those instances, unclaimed property is entrusted to the state's custody and when returned to the owner is returned without any additional compensation despite the fact that in the interim the state uses the owner's property to earn interest or to satisfy state obligations. This type of Fifth Amendment side-stepping has been attempted with some success, and this Court should be heard on this significant constitutional issue. *Compare Suever v. Connell*, 579 F.3d 1047, 1056-57 (9th Cir. 2009); *Turnacliff v. Westly*, 546 F.3d 1113, 1118-20 (9th Cir. 2009); *Simon v. Weissman*, 301 Fed. Appx. 107, 114 (3d Cir. Dec. 1, 2008); *Morris v. Chiang*, 77 Cal. Rptr. 3d 799, 804-805 (Cal. Ct. App. 2008); *Smyth v. Carter*, 845 N.E.2d 219, 224 (Ind. Ct. App. 2006); *Hooks v. Treasurer*, 961 So. 2d 425, 432 (La. Ct. App. 2007); *Norwalk v. J.P. Morgan & Co.*, 740 N.Y.S.2d 367, 368 (N.Y. App. Div. 2002); *Rowlette v. North Carolina*, 656 S.E.2d 619, 625-26 (N.C. Ct. App. 2008); *Smolow v. Hafer*, 959 A.2d 298, 303-04 (Pa. 2005); *Clark v. Strayhorn*, 184 S.W.3d 906, 915 (Tex. App. 2006); *with*

Canel v. Topinka, 818 N.E.2d 311, 325 (Ill. 2004), *and Sogg v. Zurz*, 905 N.E.2d 187, 190-92 (Ohio 2009).

CONCLUSION

For the reasons set forth above, Petitioners pray that the Court grant a writ of certiorari to review the decision and judgment of the Illinois Appellate Court.

Respectfully submitted,

JOHN R. WYLIE
Counsel of Record
DONALDSON GUIN LLC
300 South Wacker Drive, Suite 1700
Chicago, Illinois 60606
(312) 878-8391

ARTHUR T. SUSMAN
MATTHEW T. HURST
GLENN L. HARA
SUSMAN HEFFNER & HURST LLP
Two First National Plaza, Suite 600
Chicago, Illinois 60603
(312) 346-3466

CHARLES R. WATKINS
FUTTERMAN HOWARD ASHLEY
WATKINS & WELTMAN, CHTD.
122 South Michigan Avenue, Suite 1850
Chicago, Illinois 60603
(312) 427-3600

ELLIOT ZINGER
ELLIOT ZINGER & ASSOCIATES
10 South LaSalle Street, Suite 1420
Chicago, Illinois 60602
(312) 782-9464

ILLINOIS APPELLATE COURT
FIRST DIVISION

No. 1-08-2571

DARNIECE BAILEY TURNIPSEED, RAMON TURNIPSEED and RAYMOND THOMAS,	)	Appeal from the Circuit Court of Cook County.
Plaintiffs-Appellees,	)	(Filed May 4, 2009)
v.	)	
DOROTHY BROWN, Clerk of the Circuit Court of Cook County in Her Official Capacity, and THE COUNTY OF COOK,	)	Honorable Kathleen M. Pantle,
Defendants-Appellants.	)	Judge Presiding.

PRESIDING JUSTICE ROBERT E. GORDON delivered the opinion of the court:

Plaintiffs Darniece Bailey Turnipseed, Ramon Turnipseed, and Raymond Thomas seek to recover the interest that accrued on money that they deposited with defendant Dororthy [sic] Brown, the clerk of the circuit court of Cook County, in connection with bail bonds that they executed. In addition to suing defendant Brown, plaintiffs sued the county of Cook,

a body politic,[1] which, plaintiffs allege, would be liable for any judgement issued against defendant Brown.

On August 19, 2008, the circuit court of Cook county granted plaintiffs' motion for class certification and denied defendants' motion to dismiss. On October 16, 2008, the appellate court granted defendants' petition for leave to appeal the trial court's grant of class certification. For the reasons discussed below, we reverse the orders granting class certification and denying defendants' motion to dismiss.

BACKGROUND

Plaintiffs allege that, on February 2, 2002, plaintiffs Darniece Bailey Turnipseed and Ramon Turnipseed deposited $100 with defendant Brown. The amount was 10% of the $1,000 bail that had been set for plaintiff Darniece Bailey Turnipseed in a criminal matter.

The Turnipseeds made their deposit pursuant to the Illinois Code of Criminal Procedure of 1963, which provides that a "person for whom bail has been set" may obtain his or her release by executing a bail bond and depositing with the clerk of the court "a

---

[1] "Each county * * * shall be a body politic and corporate, by the name and style of 'The county of _____,' and by that name may sue and be sued, plead and may be impleaded, defend and be defended against in any court having jurisdiction of the subject matter * * * ." 55 ILCS 5/5-1001 (West 2006).

sum of money equal to 10% of the bail," with a minimum deposit of $25. 725 ILCS 5/110-7(a) (West 2006).

Plaintiffs allege that defendant Brown placed the bail bond money in an interest-bearing account. Defendants concede that defendant Brown does place bail bond money in an interest-bearing account, as required by Cook County Ordinance No. 93-0-45. Section 34-4(b) of this ordinance provides that: "All elected and appointed public officials of Cook County are directed to invest public funds in their possession or for which they are custodians in interest-bearing accounts * * * ." Cook County Taxpayers' Interest Assurance Ordinance No. 93-O-45 § 34-4(b) (November 16, 1993).

Plaintiffs allege that on April 3, 2002, all criminal charges against plaintiff Darniece Bailey Turnipseed were dropped for want of prosecution; and defendant Brown returned $90 to plaintiff Darniece Bailey Turnipseed. The returned amount ($90) was equal to the deposited amount ($100) minus 10% ($10) allowed by statute for costs. 725 ILCS 5/110-7(f) (West 2006) (clerk retains "as bail bond costs 10% of the amount deposited"). Plaintiffs allege that Brown did not pay the interest allegedly earned on the deposit. Plaintiffs allege, based upon information and belief, that defendant Brown transferred the interest to defendant Cook County.

Plaintiffs also allege that on December 17, 2003, plaintiff Raymond Thomas deposited $17,500 as bond

for the $175,000 bail set for his brother. Plaintiffs allege that on November 22, 2005, defendant Brown returned $15,750 to "Mr. Thomas." Plaintiffs fail to specify whether "Mr. Thomas" in this instance refers to the plaintiff or to his brother. As with the Turnipseeds, the amount returned to Thomas was equal to the deposited amount, minus the 10% retained by defendant Brown for costs, as authorized by statute. 725 ILCS 5/110-7(f) (West 2006). Again, plaintiffs allege that defendant Brown did not pay the interest earned on the deposit.

Defendant Dorothy Brown is the clerk of the circuit court of Cook County, and she is sued in her official capacity. Plaintiffs allege that defendant Brown is charged with supervising and administering the collection, management and return of bail bond deposits. Plaintiffs also allege that defendant County of Cook would be required to pay any judgment entered in this case against defendant Brown in her official capacity, since the county funds the clerk's office.

Plaintiffs' second amended complaint is the complaint at issue in this appeal. It alleges that section 110-7(f) of the Illinois Code of Criminal Procedure (725 ILCS 5/110-7(f) (West 2006)) prohibits defendant Brown from paying interest on bail bond money to the individuals who deposited it.

Section 110-7(f) provides in relevant part:

> "When the conditions of the bail bond have been performed and the accused has

> been discharged from all obligations in the cause, the clerk of the court shall return to the accused or to the defendant's designee by an assignment executed at the time the bail amount is deposited, unless the court orders otherwise, 90% of the sum which had been deposited and shall retain as bail bond costs 10% of the amount deposited. However, in no event shall the amount retained by the clerk as bail bond costs be less than $5." 725 ILCS 5/110-7(f) (West 2006).

Subsection (f), quoted above, requires the clerk to pay 90% of the bail amount to "the accused or to the defendant's designee." The subsection is completely silent about interest. Although subsection (f) is detailed in many respects, it does not use the word "interest" once. However, defendants admit that defendant Brown does not pay any interest earned on bail bond money.

Subsection (f) requires the clerk to pay the required amount to either "the accused or to the defendant's designee." Plaintiffs failed to allege in their complaint whether the brother of Raymond Thomas assigned his bail money to plaintiff Raymond Thomas. If no assignment was executed, then plaintiff Raymond Thomas was not owed any money by defendant Brown. The complaint also does not allege whether plaintiff Darniece Bailey Turnipseed assigned her bail money to plaintiff Ramon Turnipseed.

The second amended complaint seeks: (1) declaratory relief that subsection (f) is facially unconstitutional; (2) compensation for the alleged taking of plaintiffs' and the class' private property, namely the interest that accrued on the bail bond money while it was held by defendant Brown; and (3) injunctive relief to prevent further constitutional violations.

Count I alleges that the alleged failure to pay interest is a taking of property in violation of section 15 of article I of the Illinois Constitution, as well as the fifth and fourteenth amendments to the United States Constitution. Section 15 of article I of the Illinois Constitution provides that: "[p]rivate property shall not be taken or damaged for public use without just compensation as provided by law." Ill. Const. 1970, art. I, § 15. Similarly, the fifth amendment to the United States Constitution provides that "private property [shall not] be taken for public use, without just compensation." U.S. const., amend. V. These clauses are commonly known as the "takings clauses." *Empress Casino Joliet Corp. v. Giannoulias,* 231 Ill. 2d 62, 81 (2008). The fifth amendment is made applicable to the states by the fourteenth amendment. U.S. Const., amend. XIV; *Kelo v. City of New London,* 545 U.S. 469, 472 & n.1, 162 L. Ed. 2d 439, 447 & n.1, 125 S. Ct. 2655, 2658 & n.1 (2005) ("the Takings Clause of the Fifth amendment to the [United States] Constitution" is "made applicable to the States by the Fourteenth Amendment"); *Empress Casino,* 231 Ill. 2d at 80.

Count II alleges a federal constitutional tort, pursuant to 42 U.S.C. § 1983 (2000). Section 1983 provides that if a person acts "under color" of state law and thereby deprives another of a right secured by the United States Constitution, he or she "shall be liable to the party injured." 42 U.S.C. § 1983.

The second amended complaint describes the proposed class as follows:

> "All persons who deposited bail bond funds with the Clerk of the Circuit Court of Cook County pursuant to the Illinois Code of Criminal Procedure, and whose bail bond funds were returned to them during the period from October 18, 1999 through the date of final judgment in this action."

The proposed class is limited to those persons "whose bail bond funds were returned to them." Subsection (f) provides many reasons why bail bond money may not be returned. 725 ILCS 5/110-7(f) (West 2006). It states in relevant part:

> "Bail bond deposited by or on behalf of a defendant in one case may be used, in the court's discretion, to satisfy financial obligations of that same defendant incurred in a different case due to a fine, court costs, restitution or fees of the defendant's attorney of record. In counties with a population of 3,000,000 or more, the court shall not order bail bond deposited by or on behalf of a defendant in one case to be used to satisfy financial obligations of that same defendant

> in a different case until the bail bond is first used to satisfy court costs and attorney's fees in the case in which the bail bond has been deposited and any other unpaid child support obligations are satisfied. * * *
>
> At the request of the defendant the court may order such 90% of defendant's bail deposit, or whatever amount is repayable to defendant from such deposit, to be paid to defendant's attorney of record." 725 ILCS 5/110-7(f) (West 2006).

Thus, bail bond money may be used to pay court costs, attorney fees, child support obligations, and financial obligations of the defendant incurred in a different case. 725 ILCS 5/110-7(f) (West 2006).[2] Of course, the money will also not be returned if the defendant fails to appear. 725 ILCS 5/110-7(g) (West 2006). The description of the proposed class, contained in plaintiffs' second amended complaint, excludes those persons whose bail bond money was not returned.

Defendants moved to dismiss, pursuant to section 2-615 of the Illinois Code of Civil Procedure (735 ILCS 5/2-615 (West 2006)), claiming that the

---

[2] The bail bond form includes "a written notice to such person who has provided the defendant with the money for the posting of bail indicating that the bail may be used to pay costs, attorney's fees, fines, or other purposes authorized by the court and if the defendant fails to comply with the conditions of the bail bond" the money shall be forfeited. 725 ILCS 5/110-7(a) (West 2006).

complaint was legally insufficient. On August 19, 2008, in a written order, the trial court granted plaintiffs' motion for class certification, and denied defendants' motion to dismiss.

On October 16, 2008, the appellate court granted defendants' petition for leave to appeal the trial court's grant of class certification. Defendants in their appellate brief to this court state that they intend to assert an affirmative defense based on statute of limitations and that the applicable statutes of limitations are violated by the five-year period certified by the trial court. Since the statute of limitations is a defense that may be waived if not asserted, and since no such defense has yet been asserted in the case at bar, we will not consider this issue on this interlocutory appeal.

ANALYSIS

On this appeal, defendants claim that the trial court should not have certified the class, because the complaint failed to state a cause of action. Defendants also claim that, even if the complaint stated a valid claim, the named plaintiffs are not adequate representatives of the class, and the class is too broad.

Interlocutory Appeal

Defendants' petition for leave to appeal was granted pursuant to Supreme Court Rule 306(a)(8), which provides:

> "(a) * * * A party may petition for leave to appeal to the Appellate Court from the following orders of the trial court:
>
> * * *
>
> (8) from an order of the circuit court denying or granting certification of a class action under section 2-802 of the Code of Civil Procedure (735 ILCS 5/2-802)." 210 Ill. 2d R. 306(a)(8).

The rule, quoted above, refers to section 2-802 of the Code of Civil Procedure (735 ILCS 5/2-802 (West 2006)), which requires a trial court to determine, "as soon as practicable" after the filing of a class action, whether the suit may be maintained as a class action.

Statutory Prerequisites

Section 2-801 of the Code of Civil Procedure lists four prerequisites for a class action:

> "An action may be maintained as a class action in any court of the State and a party may sue or be sued as a representative party of the class only if the court finds:
>
> (1) The class is so numerous that joinder of all members is impracticable.

> (2) There are questions of fact or law common to the class, which common questions predominate over any questions affecting only individual members.
>
> (3) The representative parties will fairly and adequately protect the interest of the class.
>
> (4) The class action is an appropriate method for the fair and efficient adjudication of the controversy." 735 ILCS 5/2-801 (West 2006).

Our supreme court has held that plaintiffs bear the burden of demonstrating that their suit satisfies the four statutory prerequisites. *Barbara's Sales, Inc. v. Intel Corp.*, 227 Ill.2d 45, 72 (2007); *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill.2d 100, 125 (2005) ("a class may be certified only if the proponent establishes the four prerequisites set forth in the statute").

Threshold Issue

In addition to the statutory prerequisites listed above, our supreme court has held that as "a threshold matter," a trial court must determine whether the claim asserted by plaintiffs is "an actionable claim." *Barbara's Sales*, 227 Ill. 2d at 72; *Avery*, 216 Ill. 2d at 139 ("'It is well settled that a class cannot be certified unless the named plaintiffs have a cause of action'"), quoting *Spring Mill Townhouse Assn. v. OSLO Financial Services, Inc.*, 124 Ill. App. 3d 774, 779 (1982). If we find that the

claim is not actionable, then "[w]e need not determine whether plaintiffs satisfy [the statutory] class requirements" listed in section 2-801 (735 ILCS 5/2-801 (West 2006)). *Barbara's Sales,* 227 Ill. 2d at 72. For example, in *Barbara's Sales,* our supreme court overturned the trial court's decision regarding class certification, because plaintiff's claim was not actionable. *Barbara's Sales,* 227 Ill. 2d at 76-77. Having resolved the certification issue on this basis, the supreme court found that it did not need to consider the four prerequisites listed in the statute. *Barbara's Sales,* 227 Ill. 2d at 76-77. See also *Landesman v. General Motors Corp.,* 72 Ill. 2d 44, 49 (1978) (remanded to trial court with instructions to determine first "whether plaintiff's complaint stated a valid cause of action" and to consider the statutory prerequisites only if it found that a valid cause was stated); *Gonzalez v. Danaher,* 30 Ill. App. 3d 992, 996 (1975) (since plaintiff does not have a valid claim for interest on his bail bond, we do not have to consider the propriety of his proposed class action).

Defendant claims on appeal that the trial court should not have certified the class, because plaintiffs failed to state a cause of action. In reviewing the legal sufficiency of a claim, we regard all well-pleaded facts in the complaint as true, and draw all reasonable inferences in favor of the plaintiff. *Lozman v. Putnam,* 379 Ill. App. 3d 807, 821 (2008). We construe the claim liberally and find it insufficient only when it appears that plaintiffs could not recover under any set of facts. *Lozman,* 379 Ill. App. 3d at 821. At this

early stage, plaintiffs need not prove their case, and the trial court should not rule on the factual merits of their claim. *Cruz v. Unilock Chicago, Inc.*, 383 Ill. App. 3d 752, 764-65 (2008).

Standard of Review

The legal sufficiency of a claim is purely a question of law, which we review *de novo*. *Barbara's Sales*, 227 Ill. 2d at 57-58. This standard is different from the standard for reviewing the statutory prerequisites for a class action. A trial court's decision regarding the four prerequisites is within its sound discretion; and an appellate court will overturn it, only if the trial court "abused its discretion or applied impermissible legal criteria." *Avery*, 216 Ill. 2d at 125-26. However, as we will explain below, our holding would be the same under either standard.

Validity of Claim

Defendants claim that plaintiffs have not stated a cause of action because plaintiffs' bail bond agreement was a contract under Illinois law, and the agreement did not provide plaintiffs with a contractual right to interest. Defendants argue that, since plaintiffs had no contractual or statutory right to interest, there was no taking, for the purpose of the takings clauses of the United States and Illinois Constitutions, as plaintiffs allege. In addition, defendants argue that plaintiff's claims are not valid because economic losses are generally not recoverable

in tort actions, such as the constitutional tort action brought by plaintiffs. See generally *Moorman Manufacturing Co. v. National Tank Co.*, 91 Ill. 2d 69 (1982).

Plaintiffs claim that there is a long-standing common law rule that interest follows principal. See, e.g., *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164, 66 L. Ed. 2d 358, 366, 101 S.Ct. 446, 452 (1980). Plaintiffs claim that, since ownership of the principal never changed hands, the interest belonged to the depositors and defendant Brown's retention of that interest constituted a taking, for constitutional purposes.

In their appellate brief, plaintiffs also claim that, since the applicable statute is silent concerning interest, it does not bar defendant Brown from paying interest. However, this argument is at odds with their complaint, which claimed that the statute barred the return of interest. Their second amended complaint alleged that "725 ILCS 5/110-7(f) [(West 2006)], in prohibiting the return of interest on the private property held in custody by Defendant Brown * * * is facially unconstitutional."

Since there can be no taking, unless there was a right to the thing allegedly taken, we will consider first whether plaintiffs had a right to the interest. *In re Marriage of Crook*, 211 Ill. 2d 437, 448 (2004); *Cwik v. Topinka*, No. 1-07-2368 (2009) (for a taking to occur, plaintiff must have a right to the property based on existing law). In addition, it is well

established that an appellate court must first consider all nonconstitutional issues, before proceeding to rule on a constitutional ground. *People v. Melchor,* 226 Ill. 2d 24, 34 (2007), citing *In re E.H.,* 224 Ill. 2d 172, 178 (2006). Thus, we will decide first whether plaintiffs had a legal right to the interest, before considering whether defendants' retention of that interest rose to the level of a constitutional violation.

There is no statute or contract which gave plaintiffs a right to the interest. As noted above, the statute is silent concerning interest. 725 ILCS 5/110-7(f) (West 2006). To the extent that the statute formed the basis of a contract, then this contract was also silent about interest.

Over 30 years ago, this court considered the same section at issue in this appeal, and ruled that the section's silence indicated that the legislature did not intend to confer a right to interest. *Gonzalez,* 30 Ill. App. 3d at 994. The facts of *Gonzalez* are almost identical with the facts in the case at bar. In *Gonzalez,* an accused deposited money with the clerk of the circuit court of Cook County to secure a bail bond. *Gonzalez,* 30 Ill. App. 3d at 993. When the criminal charges against the accused were dismissed, the clerk paid him the amount of his deposit, minus 10% for costs. *Gonzalez,* 30 Ill. App. 3d at 993. He then brought suit, in order to recover the interest actually earned on the deposit. *Gonzalez,* 30 Ill. App. 3d at 993, 994-95 (plaintiff's case was distinguished from a case in which "no interest had been accumulated"). This court held that "[b]y its silence on the subject of

interest," the legislature intended to deny a right to recover it. *Gonzalez,* 30 Ill. App. 3d at 994, citing *Lakefront Realty v. Lorenz,* 19 Ill. 2d 415, 423 (1960) ("the silence of our refund statute on the question of interest discloses a legislative intent to deny it"). See also *Madlener v. Finley,* 128 Ill. 2d 147, 154 (1989) (discussing both *Gonzalez* and *Lakefront* with approval); *Mannix v. Donnewald,* 187 Ill. App. 3d 472, 481 (1989) ("Because a sovereign does not have to pay interest without its consent, such silence discloses an intent to deny interest"). Thus, in the case at bar, plaintiffs have no statutory right to interest.

Instead of a statute or contract, plaintiffs base their claim on, what they argue, is a common-law right to interest. However, this court has already ruled on this theory and rejected it. In *Gonzalez,* this court held that an accused had no common-law right to interest that was actually earned on bail bond money. *Gonzalez,* 30 Ill. App. 3d at 994. This court stated: "In Illinois, interest cannot be recovered in the absence of a contract or statutory provision." *Gonzalez,* 30 Ill. App. 3d at 994.

To rule for plaintiffs, we would have to reject *Gonzalez.* However, we do not see any reason why the passage of time has weakened the validity of the *Gonzalez* decision. If anything, the passage of time has strengthened it.

A decade after *Gonzalez* was decided, the Illinois Supreme Court acknowledged the *Gonzalez* decision and built on its reasoning. In *Madlener,* our supreme

court held that a court clerk had no "common law duty" to deposit a litigant's funds, held pursuant to court order, in an interest-bearing account. *Madlener,* 128 Ill. 2d at 152. First, our supreme court discussed with approval the holding in *Gonzalez* that "persons are not entitled to interest on funds which have been held by government officials unless a statute so provides." *Madlener,* 128 Ill. 2d at 154; see also *Mannix,* 187 Ill. App. 3d at 476 (discussing *Gonzalez* with approval). Next, our supreme court built on that holding to find "the correlative principle" that the "common law" does not require these same officials to deposit such funds in interest-bearing accounts. *Madlener,* 128 Ill. 2d at 154. This approval by our supreme court strengthens the precedential value of the *Gonzalez* decision.

In *Mannix,* this court explained the logic behind cases like *Gonzalez, Madlener* and *Lakefront* which rejected the idea that the government had a common-law duty to pay interest. In *Mannix,* we explained that holdings like these are "based on the rule that the sovereign is not obligated to pay interest unless it gives its consent by act of its legislature or by contract entered into by its officers." *Mannix,* 187 Ill. App. 3d at 476.

Illinois courts have repeatedly affirmed the rule on which *Gonzalez* is based, that a plaintiff cannot recover interest from the government, absent a statute or contract. *Madlener,* 128 Ill. 2d at 152, 154 (absent a statute, government officials have no "common law duty" to deposit funds in an interest-bearing

account); *Mannix,* 187 Ill. App. 3d at 476 (since interest is "a creature of statute or contract," a citizen cannot recover it from the government without statutory or contractual "authorization"); *Lakefront,* 19 Ill. 2d at 423 (plaintiff was not entitled to interest on a tax refund because "interest, being a creature of statute; is recoverable only by statute or contract"). See also *Shields v. State Employees Retirement System,* 363 Ill. App. 3d 999, 1005 (2006) ("It is well settled that interest is not recoverable absent a statute or agreement providing for it").

Plaintiffs try to distinguish *Gonzalez* by arguing, first, that the plaintiff in *Gonzalez* did not allege a claim under the takings clauses. This is a distinction without a difference. A plaintiff must have a legal right to property, before he or she can claim there was a taking; and in *Gonzalez,* we found that an accused had no legal right to the interest that had accrued on his bail deposit – no statutory right, no contact right and no common-law right. *Gonzalez,* 30 Ill. App. 3d at 994. Without a legal right, there can be no basis for plaintiffs' claims under the takings clauses; and thus *Gonzalez* precludes their claims, even though the word "taking" was not used in that case.

Plaintiffs try to distinguish *Gonzalez* by arguing, second, that the appellate court in *Gonzalez* did not "treat" the claim as one for interest that had actually accrued. That is simply not true. The appellate court in *Gonzalez* noted that the facts before it were different from the facts in *Lakeshore* [sic], because in *Lakeshore* [sic], "no interest had been accumulated."

Gonzalez, 30 Ill. App. 3d at 994. Thus, this argument is based on a mistaken premise.

Plaintiffs also cite a line of cases where citizens disputed the State's right to take certain property, and the property was deposited with the State for safekeeping pending a determination of property rights; and where the State earned interest on the property and then was ordered to return the interest with the property. *Shell Oil Co. v. Department of Revenue,* 95 Ill. 2d 541, 544, 548 (1983) (taxpayers disputed a tax; during the dispute, the tax was deposited into a protest fund; the state had to pay interest, when the money was found to be erroneously assessed); *Morton Grove Park District v. American National Bank & Trust Co.,* 78 Ill. 2d 353, 357, 365 (1980) (property owners disputed the amount that the park district paid for their condemned property; during the dispute, the county held the amount and later had to pay interest when the amount was released). See also *Canel v. Topinka,* 212 Ill. 2d 311, 313, 331 (2004) (bank delivered stock, that was presumed abandoned, to State for "safekeeping"; the State must return dividends with the stock to stock owner). Cf. *Village of Pawnee v. Johnson,* 103 Ill. 2d 411, 416, 422 (1984) (acting on behalf of municipalities, the State collected municipal taxes and determined the share to be disbursed to each municipality; the State owed interest on taxes that it segregated and simply held for the municipalities).

There are a number of difference [sic] between this line of cases and the case at bar. First, the

underlying dispute in the case at bar was not a property dispute, but a criminal action. Plaintiffs did not hand the property to the State *for the purpose* of safekeeping, but *for the purpose* of obtaining release. Compare with *Canel,* 212 Ill. 2d at 331 (stock was deposited with state for "safekeeping" during abandonment proceeding); with *Shell Oil,* 95 Ill. 2d at 545-46 (disputed tax was deposited for safekeeping during suit); with *Morton Grove Park District,* 78 Ill. 2d at 360 (disputed condemnation award was deposited for safekeeping during suit); and with *Village of Pawnee,* 103 Ill. 2d at 416 (municipal taxes were collected by the State, on the municipalities' behalf).

Second, in the case at bar, plaintiffs are not disputing the State's right to take the property; in contrast, they are voluntarily handing it over in order to receive a benefit, namely release on bail. Compare with *Shell Oil,* 95 Ill. 2d at 544 (taxpayers disputed State's right to assess tax); with *Morton Grove Park District,* 78 Ill. 2d at 357 (property owners disputed amount paid for their condemned property); and with *Canel,* 212 Ill. 2d at 313 (owner disputed abandonment of property).

Third, in this line of cases, the depositors expected to be restored to their full ownership rights, at the conclusion of the dispute. *Canel,* 212 Ill. 2d at 331 (where deposited stock was erroneously presumed to be abandoned, owner entitled to its full return); *Village of Pawnee,* 103 Ill. 2d at 416 (municipalities entitled to their full share of municipal taxes, collected by State on their behalf); *Shell Oil,* 95 Ill. 2d

at 548 (taxpayers entitled to full remission of monies that were erroneously assessed); *Morton Grove,* 78 Ill. 2d at 365 (property owners entitled to full condemnation award).

By contrast, in the case at bar, there are many reasons why the depositors may not receive back all of the bail money. It can be used to pay court costs, attorney fees, child support obligations, and fines. 725 ILCS 5/110-7(f) (West 2006). The bail bond form provides written notice to depositors that their money "may be used to pay costs, attorney's fees, fines, or other purposes authorized by the court." 725 ILCS 5/110-7(a) (West 2006). To ensure that nobody will miss the fact that the bail bond money may be used for "other purposes," the statute requires that "[t]he written notice must be: (1) distinguishable from the surrounding text; (2) in bold type or underscored; and (3) in a type size at least 2 points larger than the surrounding type." 725 ILCS 5/110-7(a) (West 2006). Thus, depositors of bail bond money do not necessarily expect to receive their money back, even if the accused appears in court.

For these reasons, we do not find this line of cases to be on point.

Applying a *de novo* standard of review, we find that plaintiffs have not stated a valid claim for interest. First, the statute is silent, and silence indicates that the legislature did not intend to confer a statutory right to recover interest. Second, plaintiffs have no common law right to recover interest. Since

plaintiffs have no right to the interest, there can be no taking of it.

In addition, the 15-page written order of the trial court did not mention *Gonzalez, Madlener, Mannix* or *Lakefront. Gonzalez,* 30 Ill. App. 3d at 994; *Madlener,* 128 Ill. 2d at 152; *Mannix,* 187 Ill. App. 3d at 476; *Lakefront,* 19 Ill. 2d at 423. Thus, even if we applied an abuse-of-discretion standard of review, we would still reverse, because the trial court failed to consider the relevant legal criteria. *Avery,* 216 Ill. 2d at 125-26.

CONCLUSION

For the foregoing reasons, we reverse the trial court's orders certifying this suit as a class action and denying defendants' motion to dismiss. We find that plaintiffs failed to state a valid cause of action, and thus their suit must be dismissed. Since plaintiffs' individual claims must be dismissed, we do not decide whether they would have been adequate class representatives or whether the proposed class was too broad. We also do not reach defendants' argument based on the *Moorman* doctrine. *Moorman Manufacturing Co. v. National Tank Co.,* 91 Ill. 2d 69 (1982).

Reversed.

HALL, and GARCIA, JJ., concur.

**IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT –
CHANCERY DIVISION**

DARNIECE BAILEY TURNIPSEED and RAMON TURNIPSEED, individually and on behalf of a class of all others similarly situated,	)	
Plaintiffs,	)	**04 CH 17172**
v.	)	**Hon. Kathleen M. Pantle**
DOROTHY BROWN, Clerk of the Circuit Court of Cook County, and COOK COUNTY, ILLINOIS, a Body Politic,	)	
Defendants.	)	

ORDER

This matter comes to be heard on Defendants Dorothy Brown, Clerk of the Circuit Court of Cook County ("Brown") and Cook County's ("The County") Motion to Dismiss and Plaintiffs Darniece Bailey Turnipseed, Raymond Thomas, and Ramon Turnipseed's ("Class") Motion for Class Certification. The major issues in both Motions significantly overlap and therefore this Court will deal with the disposition of both Motions in a single Order.

Brown is the Clerk of the Circuit Court of Cook County. One of her official duties is to accept security posted for bail bonds. The Class has filed a Complaint alleging that Brown placed monies posted by criminal defendants and their sureties into interest bearing accounts. This matter concerns the issue of whether those persons who have deposited bail bond funds with the Clerk and whose bail funds were returned to them are entitled to the interest which was paid on the amounts of money deposited by those furnishing security for the bail. The Class alleges that Brown did not pay them such interest and that her failure to pay interest results in a taking of private property without payment of just and full compensation, thereby violating both, the federal and State Constitutions. U.S. Const. amend V and XIV, Ill. Const. of 1970, Art. I § 15. The Class also seeks injunctive relief.

Brown and the County have moved to dismiss and oppose class certification on the grounds that (1) Brown's refusal to pay the Class interest on their bail bonds does not constitute a taking because Brown did not confiscate the Class' private property; (2) by depositing the bail, the Class voluntarily entered into a contract, and since the contract does not provide for interest, the Class has no contractual right to interest; and (3) the Class' claim for interest is really a claim for compensation for the loss of use of money and therefore the claim is barred by the *Moorman* doctrine. *Moorman Manufacturing Co. v. National Tank Co.*, 91 Ill.2d 69 (1982). The Motion to Dismiss has been brought pursuant to Section 2-615 of the

Illinois Code of Civil Procedure. 735 ILCS 5/2-615. A motion to dismiss under section 2-615 challenges only the legal sufficiency of the complaint and the critical inquiry is whether the allegations of the complaint, when considered in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief may be granted. *Jarvis v. S. Oak Dodge, Inc.*, 201 Ill.2d 81 (2002). All well-pleaded facts in the complaint are taken as true, but conclusions of law will not be taken as true, unless supported by specific factual allegations. *Jarvis*, 201 Ill.2d at 86.

The deposit of bail is [sic] Illinois is governed by statute. A criminal defendant may be released pending trial on his or her own recognizance. 725 ILCS 5/110-2. The defendant in this instance is not required to post any security for release. If a trial court judge does not issue a recognizance bond, the judge may require the defendant to post cash or other security as bail. 725 ILCS 5/110-7 and 110-8.

Cook County employs certain terminology for bond slips. An "I" bond is an "individual recognizance bond". The issuing judge sets a dollar amount, but the defendant is released on his or her own signature. The defendant need not deposit any cash or other security in order to obtain release. Should the defendant fail to appear in court as required, he or she thereby forfeits the bond, and becomes liable for a civil judgment in an amount equal to the dollar amount set by the issuing judge. 735 ILCS 5/110-2.

A "D" bond is a "deposit bond". The issuing judge sets the amount of bail and the defendant is required to post 10% of that amount in order to obtain release. 725 ILCS 5/110-7(a). If the defendant appears in court as required and otherwise fulfills the conditions of bond, the clerk returns 90% of the posted amount to defendant (absent an order of court which effects the return of the security) and retains 10%. 725 ILCS 5/110-7(f). The retention of the 10% by the clerk occurs regardless of whether the defendant was acquitted or convicted and is assessed even if the State declines to prosecute. *Id.* A defendant who fails to comply with the conditions of the bond forfeits the entire amount posted and is additionally liable for a civil judgment equal to the amount of bond set by the issuing judge. 725 ILCS 5/110-7(g).

A "C" bond is commonly known as a "cash bond". These types of bonds are issued primarily in drug cases. 725 ILCS 5/110-7(a). The issuing judge sets the amount of bail (typically equal to the street value of the seized narcotics) and the defendant is required to post the entire amount in order to obtain release. A defendant who fails to comply with the conditions of the bond forfeits the entire amount. *Id.*

Bail bond money, like any money held be [sic] any judicial officer in his official capacity, is in the custody of the law. *A-1 Lithoplate Inc. v. AFS Publishing Co.*, 66 Ill.App.3d 560, 562 (1978). "The clerk who holds that money retains it under the authority of the court, and keeps the money solely to be disposed of as directed by the statute." *Id.* Circuit Court judges in

Cook County routinely enter orders imposing fines, fees, .and costs against convicted defendants, and absent other order of court, Brown deducts the amounts imposed pursuant to the fines, fees, and costs Order from the bail bond. 725 ILCS 5/110-7(h). Courts may order deductions from the bail bond of other monies to be used to pay the attorney's fees of a privately retained attorney and for restitution to a victim. 725 ILCS 5/110-7(f). Pursuant to statute, courts may also order that bail money be used to reimburse the county for the services of the public defender or appointed counsel, but only after a hearing into the defendant's financial circumstances. *People v. Love,* 177 Ill.2d 550 (1997), *People v. Barbosa,* 365 Ill.App.3d 297 (2006), 725 ILCS 5/113-3.1. The trial court may, in its discretion, decide to give special consideration to the interests of a third party who posted the bond. *Love,* 177 Ill.2d at 564.

The legislature mandates that a surety who provides the bail security on behalf of a defendant be given written notice that the bail may be used to pay costs, attorney's fees, fines, and other purpose authorized by the court. 725 ILCS 5/110-7(a). Sureties are also entitled to written notice that if the defendant fails to comply with the conditions of the bail bond, the court shall enter an order declaring the bail to be forfeited. *Id.*

The County and Brown first contend that defendants entered into written contracts when they posted bail and, since the contracts do not provide for interest, defendants are not entitled to interest

payments. They primarily rely upon the California case of *Overland v. Superior Court,* 126 Cal.App.4th 131, 23 Cal.Rptr.3rd 676 (2005). However, this argument is not well-founded. The Class is not requesting that interest be paid on the contracts; the Class is seeking compensation for the taking of interest actually earned on the Class members' private property. The Illinois Supreme Court has rejected an argument similar to the one made by Brown and the County herein and found that seeking reimbursement for wrongfully withheld interest is not the same as seeking prejudgment interest on a contract. *Village of Pawnee v. Johnson,* 103 Ill.2d 411, 418 (1980). (See also *Shell Oil Co. v. Department of Revenue,* 95 Ill.2d 541 (1983)).

Further, a bail bond is a form of contract between the government on the one part and the accused and the surety on the other. *People v. Wollums*, 63 Ill.App.3d 602, 606 (1978). Brown is not a party to the contract; she is the custodian of the money. *A-1 Lithoplate, Inc.*, 66 Ill.App.3d 562. Even if she were a party, Brown cannot unilaterally change the conditions of the contract in any event. The statute is silent as to whom is entitled to interest earned on deposits, and therefore this Court will not read into the contracts new terms or provisions. *Olson v. Rossetter*, 399 Ill. 232, 238 (1948).

The County and Brown also assert that the practice at issue here is not a taking because the defendants and their sureties are only entitled, pursuant to the contract and the statute, to a return

of 90% of the amount posted. Providing interest, according to this theory, would drive up the rate of return to an amount over 90%, This point might be well-taken except that that the statute does not merely address the rate of return that those posting bond money receive, it also mandates the rate of return the clerk is entitled to retain:

> . . . (f) When the conditions of the bail bond have been performed and the accused has been discharged from all obligations in the cause the clerk of the court shall return to the accused or to the defendant's designee by an assignment executed at the time the bail amount is deposited, unless the court orders otherwise, 90% of the sum which had been deposited and shall retain as bail bond costs 10% of the amount deposited . . . 725 ILCS 5/110-7(f).

Thus, the County and Brown's argument that giving interest to defendants and their sureties would be allowing them to benefit at a greater rate of return than allowed applies with equal force to the clerk. As clerks are allowed to retain only 10% of the amount deposited, allowing them to retain more than 10% would violate the contract.

Moreover, the bond slips which the defendants and their sureties sign do not state that they are entitled to only 90% as the rate of return. The bond slip states at the top:

> STATEMENT OF DEFENDANT: I understand and accept the terms and conditions set forth below and on the reverse side of this

> bail bond. I understand in all cases, 10% of any amount posted as bail is retained by the Clerk of Court, by law. Further, I hereby certify that I understand the consequences of failure to appear for trial as required.

A similar warning to the sureties appears near the bottom of the bond slip:

> 4. I understand in all cases, 10% of any amount posted as bail is retained by the Clerk of the Circuit Court, by law.

The writing relied upon by the County and Brown does not support their position as the written contract does not provide that the defendants and their sureties agree to a rate of return of 90%; it provides that they agree that the Clerk of the Circuit Court can retain only 10% of any amount posted. Thus, those who post security never agreed to a rate of return of 90%. As there is nothing in the statute or the contract which allows the clerk to retain more than 10%, this case is properly analyzed under the Takings Clause.

The County and Brown assert that defendants and their sureties entered into commercial transactions and relinquished ownership of the money when the bail was posted. They essentially contend that the return of 90% or all of the bail security is actually a refund to which defendants and the sureties become entitled upon satisfaction of the obligations imposed by the bail bond. The County and Brown argue that ownership of the security passes

upon the deposit of the bail security. Therefore, according to the County and Brown, the Class members have relinquished the private property interests in the security and are not entitled to the interest earned on the money. However, a review of the plain language of the statutes belies this assertion.

The only legitimate function of the courts is to declare and enforce the law as enacted by the legislature, to interpret the language used by the legislature where it requires interpretation, and not to annex new provisions or substitute different ones, or read into a statute exceptions, limitations, or conditions which depart from its plain meaning. *People ex rel. The Department of Professional Regulation v. Manos,* 202 Ill.2d 563, 568 (2002). "The cardinal rule of statutory construction, to which all other rules are subordinate, is to ascertain and give effect to the legislature's intent. [Citation omitted] The best indicator of the legislature's intent is the language of the statute; such language should be accorded its plain or ordinary and popularly understood meaning. All parts of the statute should be considered together. [Citation omitted] In determining the legislature's intent, the court should consider, in addition to the statutory language, the reason for the law, the problems to be remedied, and the objects and purposes sought, [Citation omitted]. *People v. Smith,* 345 Ill.App.3d 179 184-85 (2004).

The language used in the statutes regarding bail bonds does not in any respect support the County or

Brown's assertion that ownership of the security transfers from the defendant or surety upon deposit. Section 110-7 is entitled "Deposit of Bail Security". 725 ILCS 5/110-7. "Security" is defined as "Protection; assurance; indemnification. The term is usually applied to an obligation, pledge, mortgage, deposit, lien, etc., given by a debtor in order to make sure the payment or performance of his debt, by furnishing the creditor with a resource to be used in case of failure in the principal obligation." *Black's Law Dictionary* 1522 (4th ed. 1968). The legislature would not have used the word "security" if it intended that ownership transfer upon deposit.

The language in other portions of the statute supports the Class members' assertion that ownership does not transfer. Section 110-8 allows cash, stocks, bonds and real estate to be posted as security for bail. Bond may be secured "By real estate situated in this State with unencumbered equity not exempt owned by the accused or sureties with double the amount of bail set in the bond". 725 ILCS 5/110-8(a)(2). If the bail bond is secured by real estate, then the statute mandates certain procedures:

> . . . (e) A certified copy of the bail bond and schedule of real estate shall be filed immediately in the office of the registrar of titles or recorder of the county in which the real estate is situated and *the State shall have a lien on such real estate* from the time such copies are filed in the office of the

> registrar of titles or recorded . . . 725 ILCS 5/110-8(e) (emphasis added).

If the legislature intended that ownership of posted security be relinquished by the defendant or the surety, then there would be no need for the recording of a certified copy of the bail bond nor would there be any need for the State to place on lien on the real estate. The definitions of "lien" in Black's Law Dictionary refer to a "lien" as a "claim": "[a] claim, encumbrance, or charge on property for payment of some debt, obligation or duty" and "right or claim against some interest in property created by law as an incident of contract." *Pappas v. Waldron,* 323 Ill.App.3d 330, 339 (2001) quoting *Black's Law Dictionary* 922 (6th ed. 1990). A person or entity that has a lien in another's property possesses a security interest in the land instead of legal title. *Pathway Financial v. Beach,* 162 Ill.App.3d 1036, 1039 (1987). Thus, if ownership (and therefore title) transferred upon the posting of real estate as security for a bail bond, as posited by the County and Brown, there would be no need for the State to place a lien on the real estate.

Section 110-17 sets forth the procedure a clerk must follow when bail deposits are unclaimed and provides in pertinent part:

> . . . (b) The published notice shall be entitled "*Notice of Persons Appearing to be Owners of Abandoned Property*" and shall contain: . . .

> (3) A statement that if proof of claim is not presented by the *owner* to the clerk of the circuit court and if the *owner's* right to receive the property is not established to the satisfaction of the clerk of the court within 65 days from the date of the published notice, the abandoned property will he placed in the custody of the treasurer of the county, not later than 85 days after such publication, to whom all further claims must thereafter be directed . . . 735 ILCS 5/100-17 (emphasis added).

This section specifically refers to the defendants and their sureties as owners of the property which was deposited with the clerk. The language of all the statutes regarding bail bonds consistently reflects the legislative intent that the defendants and their sureties retain ownership in the deposited security.

Further, the bond slips which defendants and their sureties sign reflect the legislative intent that ownership does not transfer. Pursuant to statute (725 ILCS 5/110-7(a)), Cook County bond slips warn the sureties of the risks involved in posting security:

> . . . 2. I understand that even if the defendant follows all court order, that this money may be ordered by the Judge to pay for the defendant's attorney fees, court costs, fines, fees and/or restitution to the victim, and that *I may lose all or part of my money.*
>
> 3. I understand that if the defendant fails to comply with the conditions reflected on this bond, *I may lose all of my money* should the court enter

> a forfeiture of bail order . . . (emphasis in original).

Criminal defendants are also warned about the consequences of failing to appear in court:

> FAILURE TO APPEAR-FORFEITURE OF BAIL
>
> Your failure to appear in court as ordered by the court may result in an arrest warrant issued for your arrest, a forfeiture of *your bail money* and a judgment for the full amount of the bail set by the court, (emphasis added).

Thus, there is no support for the County and Brown's contention that the legislature intended that the Class members relinquish their ownership interest in the security which they deposited for bail.

Case law does not support the County and Brown's position either. As stated above, the money held by the clerk is in the custody of the law. *Walker v. Cockrell,* 110 Ill.App.3d 562, 568 (1982), *A-1 Lithoplate, Inc.,* 66 Ill.App.3d at 562. "Custody" is defined as "The care and keeping of anything as when an article is said to be 'in the custody of the court.'" *Black's Law Dictionary 460* (4th ed. 1968). The Illinois Supreme Court has rejected the notion that the State, as the custodian of stock placed in its hands for safekeeping, may claim that it is entitled to the dividends issued on the stock. *Canel v. Topinka,* 212 Ill.2d 311, 324-25 (2004). The supreme court reasoned that since, at all times the shares of the stock remained the private property of the

plaintiff-owner, the dividends, as an incident of ownership, were also private property. *Id.* at 325.

The County and Brown argue that the recent case of *Alvarez v. Pappas,* Docket No. 104922, decided April 17, 2008, 2008 Ill. LEXIS 315 (2008) applies. However, in order to find that *Alvarez* applies, this Court would have to find that ownership of the security transferred to the government upon deposit of the security. *Alvarez,* Slip Op, at p. 14. As stated above, the plain language of the statutes provides that defendants and their sureties retain ownership. Further, in *Alvarez* the plaintiffs intended to transfer ownership of the funds which they used to pay their taxes. In this matter, the Class members are entitled to rely on the statutory language which clearly intends that ownership of the security does not transfer upon deposit.

In this matter, as in *Canel,* the interest belongs to the owner of the funds upon which it was earned as it "follows the principal". *Phillips v. Washington Legal Foundation,* 524 U.S. 156, 165 (1998), *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 164 (1980). The Takings Clause prohibits the use of property by the government without just compensation. *Morton Grove Park District v. American National Bank and Trust Co.,* 78 Ill.2d 353, 362 (1980).

The County and Brown also claim that the Class members' claims are barred by the *Moorman* economic loss doctrine. However, as stated above, the Class is not making a claim for compensation for loss

of the use of their money; the Class contends that the County and Brown engaged in an unconstitutional taking of their private property without just compensation. This is not a situation wherein the Class is using tort law to compensate it for monetary losses suffered as a result of duties owed to them simply as a result of a contract. *Tyler v. Gibbons,* 368 Ill.App.3d 126 (2006).

Finally, and most importantly, it is a constitutional imperative that the government compensate an owner for the taking of private property. *Monongahela Navigation Co. v. United States,* 148 U.S. 312, 336 (1892). The takings clause largely operates as a constitutional limitation, permitting the government to do what it wants so long as it pays the charge. *Kelo v. City of New London,* 545 U.S. 469, 487 fn. 19 (2005) citing *Eastern Enterprises v. Apfel,* 524 U.S. 498 (1998). The *Moorman* doctrine cannot defeat the 5th Amendment's directive that prohibits the taking of private property for public use without just compensation.

As stated above, the Class has moved for class certification. To certify a class a court must find:

(1) The class is so numerous that joinder of all members is impracticable.

(2) There are questions of fact or law common to the class, which common questions predominate over any questions affecting only individual members.

(3) The representative parties will fairly and adequately protect the interest of the class.

(4) The class action is an appropriate method for the fair and efficient adjudication of the controversy. 735 ILCS 5/2-801.

The named plaintiff has the burden of establishing each of these statutory prerequisites before the court can sanction the maintenance of a suit as a class action. *Aguilar v. Safeway Ins. Co.*, 221 Ill.App.3d 1095 (1991), To determine whether a proposed class should be certified, a court accepts the allegations of the complaint as true. *Clark v. Abbott Laboratories*, 343 Ill.App.3d 538, 544-45 (2003). A trial court's decision whether or not to certify a purported class is a matter within the sound discretion of the trial court, and a court should err in favor of maintaining class actions. *Aguilar*, 221 Ill.App.3d 1095; *Clark*, 343 Ill.App.3d at 545. In deciding whether to certify a class, a court may consider any matters of law or fact properly presented by the record including the pleadings, depositions, affidavits, answers to interrogatories, and any evidence that may have been adduced at the hearings. *Gordon v. Boden*, 224 Ill.App.3d 195, 199 (1991).

The County and Brown oppose class certification for the same reasons as stated in their Motion to Dismiss. However, the claims of the Class are viable in that, by retaining the interest earned on the deposited security and not remitting that interest to

the Class members, *Brown* has unlawfully appropriated the private property of the Class members without just compensation in violating of the Taking Clauses of the federal and State Constitutions. U.S. Const, amend. V and XIV, Ill. Const. of 1970, Art, I, § 15.

The County and Brown also contest the ability of the named plaintiffs to fairly and adequately represent the Class as the net earnings of the Turnipseed's bail deposit was too small to have been able to earn net interest. However, the purpose of the adequate representation requirement is merely to ensure that all class members will receive proper, efficient, and appropriate protection of their interests in the presentation of the class. *Clark v. TAP Pharmaceutical Products, Inc.,* 343 Ill.App.3d 538, 550 (2003). The Turnipseeds' claims are identical to those of all class members. In any event, the named plaintiffs now include Raymond Thomas whose adequacy the County and Brown do not contest because his claim totals approximately $1050.00. Mr. Thomas is clearly an adequate class representative.

Though the County and Brown do not contest the other factors the Court must consider, the Court will briefly discuss these factors. The proposed class is so numerous that the joinder of all members is impracticable. The question of numerosity depends on the particular, facts of the case. *In re: Application of Rosewell,* 236 Ill.App.3d 165, 174 (1992). Thousands of people post bond every year in Cook County. The Defendants have tendered twelve CD-Roms, six of

which contain the lists of those who made bail bond deposits between 1998 and 2004.

Illinois law requires the existence of questions of fact or law common to the class, which common questions predominate over any questions affecting only individual members. *Barliant v. Follett Corp.*, 74 Ill.2d 226, 234 (1978). "A common question may be shown when the claims of the individual class members are based upon the common application of a statute or when members are aggrieved by the same or similar conduct or a pattern of conduct [citation] A class action can properly be prosecuted where the defendants allegedly acted wrongfully in the same basic manner as to an entire class, and in such circumstances, the common class questions predominate the case, and the class action is not defeated. [citation]" *Clark,* 343 Ill.App.3d at 548. In this matter, the common question is the propriety of Brown retaining the interest on the security the defendants and their sureties deposited. Where a defendant is alleged to have acted wrongfully in the same basic manner towards an entire class, a class action is appropriate. *P.J. Concrete Pumping Service, Inc. v. Nextel West Corp.*, 345 Ill.App.3d 992, 1003 (2004). This court finds that a predominating question of fact or law exists.

Finally, a class action is the appropriate method for the fair and efficient adjudication of this dispute as the claims of individual members may be so small that individual actions would be prohibitively expensive. A class action will serve the economies of

time, effort, and expense and prevent possible inconsistent results. *Clark,* 343 Ill.App.3d at 552.

Defendants' Motion to Dismiss is denied.

Plaintiffs' Amended Motion for Class Certification is granted and the following class is certified:

> All persons who deposited bail bond funds with the Clerk of the Circuit Court of Cook County pursuant to the Illinois Code of Criminal Procedure, and whose bail bond funds were returned to them during the period from October 18, 1999 through the date of final judgment n this action.

DATE: August 19, 2008

_____

Kathleen M. Pantle

SUPREME COURT OF ILLINOIS

WEDNESDAY, SEPTEMBER 30, 2009

THE FOLLOWING CASES ON THE LEAVE TO APPEAL DOCKET WERE DISPOSED OF AS INDICATED:

No. 103546 – People State of Illinois, respondent, v. James Thivel, petitioner. Leave to appeal, Appellate Court, First District. (1-05-0590)

Petition for leave to appeal denied.

No. 103723 – People State of Illinois, respondent, v. David Norington, petitioner. Leave to appeal, Appellate Court, First District. (1-04-3439)

Petition for leave to appeal denied.

No. 103730 – People State of Illinois, respondent, v. Carlos Jimenez, petitioner. Leave to appeal, Appellate Court, First District. (1-04-2931)

Petition for leave to appeal denied.

No. 103841 – People State of Illinois, respondent, v. Demarco M. Walker, petitioner. Leave to appeal, Appellate Court, Third District. (3-04-0806)

Petition for leave to appeal denied.

No. 103861 – People State of Illinois, respondent, v. Maurice Thomas, petitioner. Leave to appeal, Appellate Court, First District. (1-05-2038)

Petition for leave to appeal denied.

No. 104016 – People State of Illinois, respondent, v. Donald Williams, petitioner. Leave to appeal, Appellate Court, First District. (1-05-0950)

Petition for leave to appeal denied.

No. 104036 – People State of Illinois, respondent, v. John Wetzl, petitioner. Leave to appeal, Appellate Court, First District. (1-05-1389)

Petition for leave to appeal denied.

No. 104111 – People State of Illinois, respondent, v. Lynn Green, petitioner. Leave to appeal, Appellate Court, First District. (1-05-0469)

Petition for leave to appeal denied.

No. 108607 – People State of Illinois, respondent, v. Benjamin Williams, petitioner. Leave to appeal, Appellate Court, First District. (1-07-0187)

Petition for leave to appeal denied.

No. 108608 – Darniece Bailey Turnipseed et al., petitioners, v. Dorothy Brown, etc., et al., respondents. Leave to appeal, Appellate Court, First District. (1-08-2571)

Petition for leave to appeal denied.

No. 108609 – People State of Illinois, respondent, v. John Hudson, Jr., petitioner. Leave to appeal, Appellate Court, First District. (1-07-1396)

Petition for leave to appeal denied.

No. 108610 – People State of Illinois, respondent, v. Chevelle Richardson, petitioner. Leave to appeal, Appellate Court, First District. (1-07-1324)

Petition for leave to appeal denied.

No. 108611 – People State of Illinois, respondent, v. Richard G. Hess, petitioner. Leave to appeal, Appellate Court, Second District. (2-06-0179)

Petition for leave to appeal denied.

No. 108612 – Founders Insurance Company, respondent, v. Albert L. Munoz et al., etc., respondents (Safeway Insurance Company, petitioner). Leave to appeal, Appellate Court, First District. (1-07-0792, 1-08-0208, 1-08-0415, 1-08-2042, 1-08-2059, 1-08-2283)

PETITION FOR LEAVE TO APPEAL ALLOWED.

This case is consolidated with Case No. 108605

No. 108613 – Peregrine Financial Group, Inc., petitioner, v. TradeMaven, L.L.C., et al., respondents. Leave to appeal, Appellate Court, First District. (1-08-1111)

Petition for leave to appeal denied.

No. 108615 – In re The Detention of Tommy O. Hardin (People State of Illinois, respondent, v. Tommy O. Hardin, petitioner). Leave to appeal, Appellate Court, Second District. (2-08-0082)

PETITION FOR LEAVE TO APPEAL ALLOWED.

ARTICLE I. GENERALLY

Sec. 34-1. Fiscal year.

The fiscal year of the County shall commence on the first Monday of December and end on the Sunday preceding the first Monday of December of each year.

(Code 1980, § 5-191; Ord. No. 72-O-54, 10-2-1972.)

Sec. 34-2. Vouchers; County departments, offices and agencies.

All County departments, offices, and agencies are directed to send directly to the County comptroller vouchers for the following items:

(1) Institutional care.

(2) Subscriptions and dues to newspapers and other periodicals.

(3) Technical meeting costs.

(4) Surety bond premiums.

(5) Heat, light, and power.

(6) Telephone.

(7) Telegraph.

(8) Automobile allowances.

(9) Reimbursement for transportation.

(10) Charges for rental of real property.

(11) Charges for court witnesses.

(Code 1980, § 6-33; Res. of 1-5-1970, p. 407.)

Sec. 34-3. Periodic payment of claims.

The County, subject to the approval of the County Board, may provide for the payment of any settlement agreement or consent judgment for a claim against the County in periodic installments which period of installments may exceed one year, or by the purchase of annuity contracts from duly-qualified insurance companies, and any such settlement agreement or consent judgment providing for installment payments, which period of installments shall be more than one year, shall be valid and binding obligations of the County.

(Code 1980, § 10-42; Ord. No. 81-O-19, 8-3-1981.)

Sec. 34-4. Investment of public funds.

(a) This section shall be known and may be cited as the "Cook County Taxpayers' Interest Assurance Ordinance".

(b) All elected and appointed public officials of Cook County are directed to invest public funds in their possession or for which they are custodians in interest-bearing accounts, except where prohibited by law or for which compelling economic reasons do not justify the use of an interest-bearing account. If any public funds are not invested in an interest-bearing account, the elected or appointed public official shall certify in writing to the Chief Financial Officer and the County Auditor the reason that such funds have not been invested in an interest-bearing account. The Chief Financial Officer and the County

Auditor will forward to the President of the County Board who, in turn, will forward to the Chairman of the Audit Committee the correspondence received from the elected or appointed officials indicating why public funds have not been invested in an interest-bearing account. On an annual basis, the Chief Financial Officer shall report to the Audit Committee a listing of all depository accounts including the department number, department name, name of account, depository institution, account number, account balance, average daily balance, authorized signers, interest rate and any explanation or certification for any noninterest-bearing accounts.

(c) The County Auditor shall report to the County Board as part of an annual audit of the accounts of each elected and appointed public official:

(1) The nature and amount of all funds for which such certifications have been received from elected or appointed public officials;

(2) The rates of return received by elected and appointed public officials on invested funds; and

(3) The average daily balance in the interest-bearing account in order to provide a benchmark against which to evaluate the rate of return the elected and appointed officials are earning on the funds.

(d) Any public funds in the possession or custody of an elected or appointed public official may be invested in any financial institution approved

from time to time by the County Board as a depository of public funds. The minimum requirements for any financial institution to be an approved depository for County funds shall include:

(1) Minimum capital requirement of $10,000,000.00;

(2) The institution must have been in operation for at least five years;

(3) Located in Cook County, and

(4) Meet regulatory requirement of the Community Reinvestment Act and not engage in predatory lending practices.

No elected or appointed public official shall open any new account in an approved depository without reporting the opening of such account to the County Auditor and the Chief Financial Officer of the county within seven days of the opening of such account.

(e) Any elected or appointed public official who invests any public funds in any approved depository which are in excess of the insured limits of such depository shall require that such depository provide at least 102 percent collateral or provide a surety bond in an amount of 102 percent on any funds in excess of the insured limit of such depository, except as provided in Subsection (f) of this section.

(f) The Cook County Treasurer is authorized to make use of the Illinois Public Treasurer's Investment Pool (IPTIP), pursuant to 30 ILCS 235/2(e) (1992), on a limited basis facilitate wire

transfer of funds due and owing to Cook County payable by the State of Illinois. Such funds, as they become due to Cook County, may be invested by the Cook County Treasurer in the IPTIP for a period of time not to exceed ten calendar days. The collateral requirement on County funds invested by the County Treasurer in the IPTIP shall not be less than 102 percent.

Whenever a public agency deposits any public funds in a financial institution, the public agency shall enter into an agreement with the financial institution requiring any funds not insured by the Federal Depository Insurance Corporation to be collateralized by securities, a letter of credit or mortgage backed securities in an amount equal to at least 102 percent of the market value of that amount of funds deposited exceeding the insurance limitation provided by the Federal Depository Insurance Corporation. The letter of credit must be issued by a financial institution that is rated "A" or better by at least two of the following rating agencies: Fitch, Moody's and Standard & Poor's. Mortgage backed securities used as collateral must be guaranteed by the Federal Home Loan Bank system, the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association.

(g) Except as provided in Subsection (f) of this section, Cook County funds placed in the IPTIP shall be invested in the same manner, in the same types of investments and subject to the same limitations provided for the investment of funds in the State Treasury.

(h) The Cook County Treasurer, the Chief Financial Officer of Cook County and the County Comptroller are authorized to execute on behalf of Cook County, an "Application and Agreement to Participate in the Illinois Public Treasurer's Investment Pool", the terms of which shall not be inconsistent with this section.

(i) As used in this section, the term "public funds" shall mean current operating funds, special funds, interest and sinking funds, and funds of any kind or character belonging to or in the custody of any elected or appointed public official. The County Board may supersede the provisions of this section should the authorizing ordinance specify the permitted investments and with respect to similar funds held in a fiduciary capacity pursuant to statute or specific ordinance.

(Ord. No. 91-O-13, §§ 1-6, 3-5-1991; Ord. No. 93-O-45, §§ 1-9, 11-16-1993; Ord. No. 06-O-05, §§ 1-9, 1-18-2006.)

Sec. 34-5. Quarterly budget review.

(a) The head of each department or other agency is required to submit, to the Cook County Board of Commissioners, on or before March 30, June 30, September 30 and December 30 of each year, a detailed report, in a format prepared and promulgated by the Director of Budget and Management Services, showing what steps have been taken to improve or maintain performance in the department or agency since the beginning

of the respective fiscal year, and the results those steps have brought. At a minimum the quarterly reports shall contain the information requested below. This report will replace all of the information that was formerly included in the "Mid-year budget review" ordinance (04-0-20).

(1) List all services and programs provided by your Department that are required and explicitly mandated by law. Include State and/or County Statute(s) and identify the business units that are associated with each program or service.

(2) List all services and programs provided by your Department other than those mentioned above and identify the business units that are associated with each program or service.

(3) List all grants that support or enhance services and programs and identify the business units that are associated with each program or service.

(4) List all additional grants not included above, which are anticipated to be received in the upcoming Fiscal Year. Include:

a. FTE and Personnel Costs

b. Fringe Benefits

c. Impersonal Costs

d. Capital Costs

e. Matching Funds

f. Length of grant funding commitment

(5) List all new programs other than those grants mentioned above to be considered in the upcoming Fiscal Year. New programs require a business plan to include the following:

a. How many new employees (FTE)

b. How many (people/clients?) employees (FTE) enrolled in the program

c. Source of Funding

d. Facilities Needed

e. Total cost of facilities including equipment, rent, utilities and maintenance

f. FTE and Personnel Costs

g. Fringe Benefits

h. Impersonal Costs

i. Capital Costs

(6) List any General Fund or Grant Funded programs that involve other Departments within the County and identify the business units that are associated with each program or service.

(7) List any specific programs where a reduction or elimination of revenue is anticipated in the upcoming Fiscal Year and identify the business units that are associated with each program or service.

(8) List highlighted goals in the Department's current Fiscal Year Executive Recommendation and provide a status including an estimate date of completion.

(9) Provide a long term strategic vision for ideal operation of the Department, including automation and other service improvements and cost reductions. Highlight the benefits and costs. Summarize the plan that is taking or will take the Department towards this vision.

(b) No transfer of funds will be presented to the Finance Committee for consideration without departments being in compliance with their quarterly budget reports which should include performance measures for all services and programs mentioned above along with any changes to the information provided. This information should be approved by the Chief Financial Officer a minimum of two weeks prior to the Finance Committee's Transfer of Funds Meeting, with form and data satisfactory to the Budget Department.

(Ord. No. 04-O-20, 6-3-2004; Ord. No. 08-O-36, 6-3-2008.)

Secs. 34-6-34-30. Reserved.

ILCS Const. Art. 1, § 9. Bail and Habeas Corpus

All persons shall be bailable by sufficient sureties, except for the following offenses where the proof is evident or the presumption great: capital offenses; offenses for which a sentence of life imprisonment may be imposed as a consequence of conviction; and felony offenses for which a sentence of imprisonment, without conditional and revocable release, shall be imposed by law as a consequence of conviction, when the court, after a hearing, determines that release of the offender would pose a real and present threat to the physical safety of any person. The privilege of the writ of habeas corpus shall not be suspended except in cases of rebellion or invasion when the public safety may require it.

Any costs accruing to a unit of local government as a result of the denial of bail pursuant to the 1986 Amendment to this Section shall be reimbursed by the State to the unit of local government.

CREDIT(S)

Amendment adopted general election Nov. 2, 1982, eff. Nov. 23, 1982; Nov. 4, 1986, eff. Nov. 25, 1986.

Formerly cited as IL ST CH 38 ¶ 110-7

Effective: August 29, 2008

725 ILCS 5/110-7. Deposit of Bail Security

§ 110-7. Deposit of Bail Security.

(a) The person for whom bail has been set shall execute the bail bond and deposit with the clerk of the court before which the proceeding is pending a sum of money equal to 10% of the bail, but in no event shall such deposit be less than $25. The clerk of the court shall provide a space on each form for a person other than the accused who has provided the money for the posting of bail to so indicate and a space signed by an accused who has executed the bail bond indicating whether a person other than the accused has provided the money for the posting of bail. The form shall also include a written notice to such person who has provided the defendant with the money for the posting of bail indicating that the bail may be used to pay costs, attorney's fees, fines, or other purposes authorized by the court and if the defendant fails to comply with the conditions of the bail bond, the court shall enter an order declaring the bail to be forfeited. The written notice must be: (1) distinguishable from the surrounding text; (2) in bold type or underscored; and (3) in a type size at least 2 points larger than the surrounding type. When a person for whom bail has been set is charged with an offense under the Illinois Controlled Substances Act or the Methamphetamine Control and Community Protection Act which is a Class X felony,

or making a terrorist threat in violation of Section 29D-20 of the Criminal Code of 1961[1] or an attempt to commit the offense of making a terrorist threat, the court may require the defendant to deposit a sum equal to 100% of the bail. Where any person is charged with a forcible felony while free on bail and is the subject of proceedings under Section 109-3 of this Code the judge conducting the preliminary examination may also conduct a hearing upon the application of the State pursuant to the provisions of Section 110-6 of this Code to increase or revoke the bail for that person's prior alleged offense.

(b) Upon depositing this sum and any bond fee authorized by law, the person shall be released from custody subject to the conditions of the bail bond.

(c) Once bail has been given and a charge is pending or is thereafter filed in or transferred to a court of competent jurisdiction the latter court shall continue the original bail in that court subject to the provisions of Section 110-6 of this Code.

(d) After conviction the court may order that the original bail stand as bail pending appeal or deny, increase or reduce bail subject to the provisions of Section 110-6.2.

(e) After the entry of an order by the trial court allowing or denying bail pending appeal either party may apply to the reviewing court having jurisdiction

---

[1] 720 ILCS 570/100 et seq.

or to a justice thereof sitting in vacation for an order increasing or decreasing the amount of bail or allowing or denying bail pending appeal subject to the provisions of Section 110-6.2.

(f) When the conditions of the bail bond have been performed and the accused has been discharged from all obligations in the cause the clerk of the court shall return to the accused or to the defendant's designee by an assignment executed at the time the bail amount is deposited, unless the court orders otherwise, 90% of the sum which had been deposited and shall retain as bail bond costs 10% of the amount deposited. However, in no event shall the amount retained by the clerk as bail bond costs be less than $5. Bail bond deposited by or on behalf of a defendant in one case may be used, in the court's discretion, to satisfy financial obligations of that same defendant incurred in a different case due to a fine, court costs, restitution or fees of the defendant's attorney of record. In counties with a population of 3,000,000 or more, the court shall not order bail bond deposited by or on behalf of a defendant in one case to be used to satisfy financial obligations of that same defendant in a different case until the bail bond is first used to satisfy court costs and attorney's fees in the case in which the bail bond has been deposited and any other unpaid child support obligations are satisfied. In counties with a population of less than 3,000,000, the court shall not order bail bond deposited by or on behalf of a defendant in one case to be used to satisfy financial obligations of that same defendant in a

different case until the bail bond is first used to satisfy court costs in the case in which the bail bond has been deposited.

At the request of the defendant the court may order such 90% of defendant's bail deposit, or whatever amount is repayable to defendant from such deposit, to be paid to defendant's attorney of record.

(g) If the accused does not comply with the conditions of the bail bond the court having jurisdiction shall enter an order declaring the bail to be forfeited. Notice of such order of forfeiture shall be mailed forthwith to the accused at his last known address. If the accused does not appear and surrender to the court having jurisdiction within 30 days from the date of the forfeiture or within such period satisfy the court that appearance and surrender by the accused is impossible and without his fault the court shall enter judgment for the State if the charge for which the bond was given was a felony or misdemeanor, or if the charge was quasi-criminal or traffic, judgment for the political subdivision of the State which prosecuted the case, against the accused for the amount of the bail and costs of the court proceedings; however, in counties with a population of less than 3,000,000, instead of the court entering a judgment for the full amount of the bond the court may, in its discretion, enter judgment for the cash deposit on the bond, less costs, retain the deposit for further disposition or, if a cash bond was posted for failure to appear in a matter involving enforcement of child support or maintenance, the amount of the cash

deposit on the bond, less outstanding costs, may be awarded to the person or entity to whom the child support or maintenance is due. The deposit made in accordance with paragraph (a) shall be applied to the payment of costs. If judgment is entered and any amount of such deposit remains after the payment of costs it shall be applied to payment of the judgment and transferred to the treasury of the municipal corporation wherein the bond was taken if the offense was a violation of any penal ordinance of a political subdivision of this State, or to the treasury of the county wherein the bond was taken if the offense was a violation of any penal statute of this State. The balance of the judgment may be enforced and collected in the same manner as a judgment entered in a civil action.

(h) After a judgment for a fine and court costs or either is entered in the prosecution of a cause in which a deposit had been made in accordance with paragraph (a) the balance of such deposit, after deduction of bail bond costs, shall be applied to the payment of the judgment.

CREDIT(S)

Laws 1963, p. 2836, § 110-7, eff. Jan. 1, 1964. Amended by Laws 1965, p. 1976, § 1, eff. July 22, 1965; Laws 1967, p. 2365, § 1, eff. July 31, 1967; P.A. 76-1195, § 1, eff. Sept. 4, 1969; P.A. 76-1394, § 1, eff. Sept. 19, 1969; P.A. 76-1801, § 1, eff. Oct. 9, 1969; P.A. 76-2078, § 1, eff. July 1, 1970; P.A. 80-1149, § 1, eff. July 1, 1978; P.A. 82-680, § 1, eff. July 1, 1982; P.A.

83-336, § 1, eff. Sept. 14, 1983; P.A. 84-945, § 2, eff. Sept. 25, 1985; P.A. 86-337, § 1, eff. Jan. 1, 1990; P.A. 86-984, § 1, eff. Dec. 13, 1989; P.A. 86-1028, Art. II, § 2-20, eff. Feb. 5, 1990; P.A. 88-287, § 5, eff. Jan. 1, 1994; P.A. 89-469, § 5, eff. Jan. 1, 1997; P.A. 91-94, § 10, eff. Jan. 1, 2000; P.A. 91-183, § 5, eff. Jan. 1, 2000; P.A. 92-16, § 90, eff. June 28, 2001; P.A. 93-371, § 5, eff. Jan. 1, 2004; P.A. 93-760, § 10, eff. Jan. 1, 2005; P.A. 94-556, § 1080, eff. Sept. 11, 2005; P.A. 95-952, § 5, eff. Aug. 29, 2008.

Formerly Ill.Rev.Stat.1991, ch. 38, ¶ 110-7.

725 I.L.C.S. 5/110-7, IL ST CH 725 § 5/110-7

Current through 96-828, with the exception of 96-782, 96-784, 96-792, 96-793, 96-795, 96-800, 96-801, 96-812, 96-819, and 96-820 of the 2009 Regular Session of the 96th General Assembly.

IN CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, CHANCERY DIVISION

DARNIECE BAILEY TURNIPSEED, RAMON TURNIPSEED, and RAYMOND THOMAS, individually and on behalf of a class of all others similarly situated,	)	No. 04 CH 17172
Plaintiffs,	)	JURY TRIAL DEMANDED
v.	)	
DOROTHY BROWN, Clerk of the Circuit Court of Cook County, Illinois, and COOK COUNTY ILLINOIS,	)	
Defendants.	)	

SECOND AMENDED CLASS ACTION COMPLAINT

(Filed Dec. 18, 2007)

Plaintiffs Darniece Bailey Turnipseed, Ramon Turnipseed, and Raymond Thomas, for their class action complaint against defendants Dorothy Brown, Clerk of the Circuit Court of Cook County, Illinois, in her official capacity, and Cook County, Illinois and allege as follows:

INTRODUCTION

1. This action arises under the Fifth and Fourteenth Amendments to the United States Constitution,

as well as Article I, §15 of the Constitution of the State of Illinois, and concerns the unlawful confiscation of interest earned on private property – bail bond deposits – while it is held in custody by the Defendant Brown pursuant to the Illinois Code of Criminal Procedure, 725 ILCS 110/1 *et seq.* (the "Code"). Pursuant to the Code, a person for whom bail has been set may obtain release from custody by executing a bail bond and depositing with Defendant Brown 10% of the bail amount, with a minimum of $25. Upon deposit, the bail money is invested by Defendant Brown and earns interest. Upon satisfaction of the bail bond requirements and when "the accused has been discharged from all obligations in the cause," 725 ILCS 5/110-7(f), Defendant Brown must return 90% of the deposited bail bond money, and may retain the other 10% "as bail bond costs." Under established federal and state law the interest earned by Defendant Brown on bail bond deposits is private property owned by the person who made the deposit – it "follows the principal." Nevertheless, the Code prohibits Defendant Brown from returning the interest to its proper owner, and in fact she does not return it, nor is the bailed person (or the person who placed the bail deposit) given compensation for his or her private property. The failure to allow the return of that interest to the bailed person (or the person who placed the bail deposit) is a facial taking of private property without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, §15 of the Illinois Constitution.

2. In this lawsuit, Plaintiffs seek on their own behalf and on behalf of the Class defined herein a declaration that the Code, specifically 725 ILCS 5/110-7(f), in prohibiting the return of interest on the private property held in custody by Defendant Brown and her policy and practice of never returning the interest, is facially unconstitutional. Plaintiffs also seek just compensation for the taking of Plaintiffs' and the Class's private property – the interest that actually accrues on their bail bond money while it is held by Defendant Brown – together with injunctive relief to prevent further violations of the Plaintiffs' and the Class's constitutional rights.

3. Plaintiffs bring this action on their own behalf and on behalf of the following Class:

> All persons who deposited bail bond funds with the Clerk of the Circuit Court of Cook County pursuant to the Illinois Code of Criminal Procedure, and whose bail bond funds were returned to them during the period from October 18, 1999 through the date of final judgment in this action.

PARTIES

4. Plaintiffs [sic] Darniece Bailey Turnipseed is an individual and is and has at all times relevant been a citizen and resident of the State of Illinois. Plaintiff Ramon Turnipseed is an individual and a citizen and resident of the State of Georgia.

5. Plaintiff Raymond Thomas is an individual and is and has at all times been a citizen and resident of the State of Illinois.

6. Defendant Dorothy Brown is the Clerk of the Circuit Court of Cook County, Illinois. In that position, pursuant to §5-110/7 of the Act, 725 ILCS §5-110/7, Defendant Brown (and her predecessors and successors) has been and is charged with supervising and administering, and has supervised and administered, the collection, management, and return of bail bond deposits. Defendant Brown is sued in her official capacity.

7. Defendant Cook County is a unit of local government authorized and established by the General Assembly of the State of Illinois. Because it funds the office of the Clerk of the Circuit Court of Cook County, Defendant Cook County is required to pay any judgment entered in this case against Defendant Brown in her official capacity.

FACTS

8. The right to bail is guaranteed by Article I, § 9 of the Illinois Constitution.

9. Section 110-7(a) of the Illinois Code of Criminal Procedure, 725 ILCS 5/110-7(a), provides that a person for whom bail has been set can obtain his or her release from custody by executing a bail bond and depositing with the Clerk of the Circuit

Court 10% of the bail amount set by the court, with a minimum deposit of $25.

10. In §5/110-7(f), 725 ILCS 5/110-7(f), the Code provides that if the bailed person satisfies the bond's requirements and has been fully discharged from all obligations, the Clerk is to return 90% of the bail bond deposit, and is to retain the other 10% "as bail bond costs," with a minimum of $5.

11. Conversely, should the person fail to meet the conditions of the bail bond, the Court may enter an order of forfeiture, and the State's Attorney may institute proceedings to have the bail bond money declared forfeited and for judgment on the balance of the bond amount. At all times prior to its being declared actually forfeited, however, Defendant Brown's possession of bail bond deposits is purely custodial, and the bail bond deposit remains the private property of the depositor.

12. Upon its deposit, Defendant Brown places bail bond money in an interest-bearing account or accounts, or interest-bearing instruments. Upon information and belief, after return of the bail bond principal, Defendant Brown causes any accumulated interest to be transferred to Cook County.

13. Despite the custodial nature of the Defendant Brown's possession, however, the Code does not direct that Defendant Brown give property owners the income earned on their private property when it is returned and Defendant Brown does not do so.

14. In *Morton Grove Park District v. American National Bank and Trust Company*, 78 Ill.2d 353, 362, 399 N.E.2d 1295, 1299, 35 Ill.Dec. 767, 771 (1980) ("*Morton Grove*"), the Illinois Supreme Court defined "property":

> The word "property" as employed in the taking clause of the Federal and Illinois constitutions includes every interest anyone may have in any and everything which is the subject of ownership, together with the right to possess, use, enjoy and dispose of the same.

A copy of the *Morton Grove* opinion is attached hereto as Exhibit A.

15. The Illinois Supreme Court has recognized the general rule that "interest follows principal," holding in *Morton Grove*, 78 Ill.2d at 362-63, 399 N.E.2d at 1299, 35 Ill. Dec. at 771, that:

> The earnings on the funds deposited are a mere incident of ownership of the fund itself. The "taking clause" provision [of the United States and Illinois Constitutions] applies to the earnings in the same manner, and with the same force, as it applies to the principal.

16. In *Morton Grove*, the Illinois Supreme Court held that money awarded to an owner of real property in a condemnation proceeding while the money is in possession of the county treasurer pending resolution of a property owner's appeal is itself private property, and "[t]he use of the award money by the county

treasurer, to earn interest which is not paid to the owner but to the county, is clearly a taking of private property for public use." *Id.*, 78 Ill.2d at 362, 399 N.E.2d at 1299, 35 Ill. Dec. at 771.

17. As a result, the Illinois Supreme Court held:

> In our case the money that was deposited with the county treasurer belonged to the condemnees and at no time did the county have a legitimate claim to it or any interest in it.
>
> We hold that [the property owners] are entitled to be reimbursed for the full amount of money which has been earned on the sum deposited with the county treasurer pursuant to the order of the Circuit Court of Cook County.

Id., 78 Ill.2d at 365, 399 N.E.2d at 1300, 35 Ill.Dec. at 772.

18. The United States Supreme Court has also held that retention of interest earned on private funds held by a government agency is a taking in violation of the Fifth Amendment. In *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162, 66 L.Ed.2d 358, 367, 101 S.Ct. 446, 451 (1980) ("*Webb's*"), the United States Supreme Court, finding unconstitutional a Florida statute which allowed a county clerk to retain interest earned on interpleader funds, stated:

> [A] State, by *ipse dixit*, may not transform private property into public property without

> compensation, even for the limited duration of the deposit in court. This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of governmental power.

In *Webb's*, the Supreme Court held that all interest earned on the interpleader funds belonged not to the government but to the owners of the funds, and must be returned to them. A copy of the *Webb's* opinion is attached hereto as Exhibit B.

19. By authorizing Defendant Brown to retain the interest earned on bail bond money, and by her not remitting that interest along with the deposited funds when returned to their owner, Defendant Brown has unlawfully appropriated the interest on such private property and does not and has not paid just and full compensation.

20. According to the Defendant Brown's records, for the period from August 1999 through April 2004, deposited bail bond money earned in excess of $10 million in interest. Theat interest earned on bail bond money belonged to the owners of the bail bond money itself, but was retained without compensation by Defendant Brown and, upon information and belief, transferred to Defendant Cook County when the deposited funds were returned.

PLAINTIFFS' PROPERTY

21. On or about February 2, 2002, Plaintiffs Darniece Bailey Turnipseed and Ramon Turnipseed posted a cash deposit of $100 as bond for the $1,000 bail set for Plaintiff Darniece Bailey Turnipseed. The bond number was D7268914.

22. On or about April 3, 2002, all charges against Darniece Bailey Turnipseed were dismissed for want of prosecution.

23. Plaintiff Darniece Bailey Turnipseed having otherwise satisfied all terms of her bail, on April 3, 2002, Defendant Brown returned to Plaintiff the amount deposited by Plaintiffs as bond, minus 10%, a total of $90. Pursuant to 725 ILCS 5/110-7(f), Defendant Brown did not return the interest earned on the Plaintiffs' bail bond deposit, but upon information and belief transferred that interest to Defendant Cook County.

24. On or about December 17, 2003, Plaintiff Raymond Thomas posted a cash deposit of $17,500 as bond for the $175,000 bail set for his brother. The bond number was D7671116.

25. All conditions of bail having been satisfied, on or about November 22, 2005, Defendant Brown returned to Mr. Thomas the amount of the bond he posted minus 10%, a total of $15,750. Pursuant to 715 ILCS 5/110-7(f), Defendants Brown did not return the interest earned on Plaintiff Thomas's bail deposit, but

upon information and belief transferred that interest to Defendant Cook County.

CLASS ACTION ALLEGATIONS

26. Plaintiffs bring this action as a class action pursuant to Rule 801 of the Illinois Code of Civil Procedure on behalf of the Class.

27. Plaintiffs are unable to determine the exact number of individuals and entities comprising the Class because this information is solely within the possession and control of the Defendants. According to Defendant Brown, however, during the period from August 1999 to April 2004, bail bond deposits were used by Defendant Brown to earn a total of $10,142,567.01 in interest. From this, and the size of the Cook County Criminal Court system itself, the Court may infer that the Class will be made up of thousands of individuals, most or all of whom will have a claim too small to warrant an individual action. Thus, the Class is sufficiently numerous to make joinder of all Class members impossible.

28. Common questions of law and fact exist, and include but are not limited to, the following:

a. whether the interest earned on bail bond money held in custody by Defendant Brown is private property;

b. whether Defendant Brown's retention of the interest earned on bail bond money is a taking of private property without just or

full compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution and/or Article I, §15 of the Constitution of the State of Illinois; and

c. what constitutes a proper remedy for the taking of such private property.

Conversely, the only individual questions affecting Class members is the precise amount of each Class Member's private property wrongfully withheld by Defendant Brown and the amount of full and just compensation due each Class member. Thus, common questions will predominate over any individual questions.

29. Plaintiffs and their counsel will fairly and adequately protect the interests of the Class. The interests of the Class representatives are consistent with those of the Class, and they have no interests antagonistic to the Class. Plaintiffs are represented by experienced and able counsel whose firm has successfully represented plaintiff classes in complex matters throughout the United States in both federal and state courts, including cases involving constitutional issues such as presented here.

30. Class certification is an appropriate method for the fair and efficient adjudication of this matter. Each Class member's claim challenges the constitutionality of the same statute, and the prosecution of separate actions would create a risk of inconsistent or varying adjudications with respect to individual members of the Class that would establish incompatible

standards of conduct for the Defendants. Moreover, adjudications with respect to individual Class members would as a practical matter be dispositive of interests of other members not parties to the adjudications or would substantially impair or impede the ability to protect their interests. Finally, Defendant Brown has acted or refused to act on grounds generally applicable to the Class, making final injunctive or declaratory relief to the Class as a whole appropriate.

COUNT I

FACIAL TAKING CLAIM

(Defendants Dorothy Brown in her official capacity and Cook County)

31. Plaintiffs reallege all preceding paragraphs as if fully set forth here.

32. The Fifth Amendment to the United States Constitution, made applicable to the states and their political subdivisions by the Fourteenth Amendment to the United States Constitution, provides in relevant part: "private property [shall not] be taken for public use, without just compensation."

33. Similarly, Article I, §15 of the Illinois Constitution provides:

> Private property shall not be taken or damaged for public use, without just compensation as provided by law. Such compensation shall be determined by a jury as provided by law.

34. The interest earned on private property owned by Plaintiffs and the Class while in Defendant Brown's custody pursuant to the Code is itself private property.

35. The Code and Defendant Brown's policy and practice of not returning the interest provides a windfall to the Defendant Cook County and places upon persons who avail themselves of their constitutional right to bail, as guaranteed under Article I, §9 of the Illinois Constitution, an unfair burden which in fairness and equity should be borne by all citizens of the County.

36. By retaining the interest and transferring it for use by Defendant Cook County, Defendant Brown has violated and continues to violate the prohibition against the taking of private property without payment of just and full compensation as set forth in the Fifth and Fourteenth Amendments to the United States Constitution and Article I, §15 of the Illinois Constitution.

WHEREFORE, Plaintiffs pray that the Court:

37. Determine that this action may be maintained as a class action pursuant to 735 ILCS 5/2-801 *et seq.*, on behalf of the Class defined herein and declare Plaintiffs to be proper Class representatives and their counsel to be Class counsel;

38. Declare the retention of interest on the private property deposited with Defendant Brown as bail bond money pursuant to the Illinois Code of

Criminal Procedure, 735 ILCS 5/110-1 *et seq.*, to be an unconstitutional taking of private property without just and full compensation in violation of to [sic] the Fifth and Fourteenth Amendments to the Constitution of the United States and Article I, §15 of the Constitution of the State of Illinois;

39. Enter a temporary, preliminary and/or permanent order providing for appropriate equitable and injunctive relief to ensure Plaintiffs and the Class receive full and just compensation for the taking of their private property and to enjoin Defendant Brown from pursuing the illegal policies, acts and practices complained of herein;

40. Order that Defendant Cook County pay to the Class any amount for which Defendant Brown is found and adjudged to owe as compensation for the taking of Plaintiffs' and the Class's private property;

41. Award counsel for Plaintiffs and the Class reasonable attorneys' fees, together with reimbursement of expenses and costs of suit as allowed by law; and

42. Award such other and further relief as the Court deems just and proper.

COUNT II

VIOLATION OF 42 U.S.C. §1983
(Defendant Dorothy Brown in her official capacity)

43. Plaintiffs reallege all preceding paragraphs as if fully set forth here.

44. 42 U. S. C. § 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

45. The Fifth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment to the United States Constitution, provides in relevant part: "private property [shall not] be taken for public use, without just compensation."

46. The interest earned on private property owned by Plaintiffs and the Class while in the Defendant Brown's custody pursuant to the Act is private property.

47. By requiring Defendant Brown to retain the interest earned on bail bond deposits, the Code

provides a windfall to the County of Cook and places upon property owners whose private property has been taken into custody by the Defendant Brown pursuant to the Code an unfair burden which in fairness and equity should be borne by all citizens.

48. By retaining the interest and transferring them to Cook County, Defendant Brown acted and acts under color of state law and has violated and continues to violate the Fifth and Fourteenth Amendments' prohibition against the taking of private property without payment of just compensation.

49. Defendant Brown's unlawful retention of the interest earned on Plaintiffs' and the Class's private property is a taking of such property without just compensation, and so a deprivation of the Plaintiffs' and the Class's rights secured under the Fifth and Fourteenth Amendments to the United States Constitution.

WHEREFORE, Plaintiffs pray that the Court:

50. Determine that this action may be maintained as a class action pursuant to 735 ILCS 5/2-801 *et seq.*, on behalf of the Class defined herein and declare the Plaintiffs to be proper Class representatives and their counsel to be Class counsel;

51. Declare the retention of interest on the private property deposited with the Defendant Brown as bail bond money pursuant to the Illinois Code of Criminal Procedure, 735 ILCS 5/110-1 *et seq.*, to be an unconstitutional taking of private property without

just and full compensation in violation of Article I, § 15 of the Constitution of the State of Illinois and the Fifth and Fourteenth Amendments to the United States Constitution, in violation of 42 U.S.C. §1983;

52. Enter appropriate injunctive relief requiring, for all bail bond deposits returned from the date of judgment forward, the return also of all earnings on such deposits while held by Defendant Brown;

53. Award counsel for Plaintiffs and the Class reasonable attorneys' fees, including such reasonable fees as may be awarded pursuant to 42 U.S.C. § 1988, together with reimbursement of expenses and costs of suit as allowed by law; and,

54. Award such other and further relief as the Court deems just and proper.

DARNIECE BAILEY TURNIPSEED, RAMON TURNIPSEED, and RAYMOND THOMAS, Individually and on behalf of the Class

By: /s/ *Arthur Susman*
One of the Attorneys for Plaintiffs

Date: December 18, 2007

John R. Wylie
Charles R. Watkins
Futterman Howard Watkins
Wylie & Ashley, Chtd.
122 S. Michigan Avenue,
Suite 1850
Chicago, Illinois 60603
Telephone: (312) 427-3600

Arthur T. Susman
Susman, Heffner & Hurst, LLP
Two First National Plaza
Suite 600
Chicago, Illinois 60603
Telephone: (312) 346-3466

Elliot R. Zinger
Elliot Zinger & Associates
10 South La Salle Street
Suite 1420
Chicago, Illinois 60602
Telephone: (312) 782-9464

No. 09-763

IN THE

Supreme Court of the United States

DARNIECE BAILEY TURNIPSEED, RAMON TURNIPSEED AND RAYMOND THOMAS,

Petitioners,

v.

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, IN HER OFFICIAL CAPACITY AND THE COUNTY OF COOK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT

BRIEF IN OPPOSITION

PATRICK T. DRISCOLL, JR.
Deputy State's Attorney
Chief, Civil Actions Bureau

JEFFREY S. MCCUTCHAN
STEPHEN L. GARCIA
CATHERINE M. KELLY
PAUL A. CASTIGLIONE*
pcastig@cookcountygov.com
Assistant State's Attorneys
of Counsel

ANITA ALVAREZ
Cook County State's Attorney
500 Richard J. Daley Center
Chicago, Illinois 60602
(312) 603-1840
Counsel for Respondents

* *Counsel of Record*

228611

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether the decision of the Illinois Appellate Court below that Plaintiffs failed to state a claim under the Takings Clause of the Fifth Amendment rests upon a state law ground that is independent of the federal question and adequate to support the judgment.

2. Whether a person who voluntarily enters into a bail bond agreement under Section 110-7(a) of the Illinois Code of Criminal Procedure is entitled to interest under the Takings Clause of the Fifth Amendment on money paid pursuant to this agreement, where the terms of the contract provide for a return of up to 90% of funds paid but not interest.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	v
STATEMENT OF THE CASE	1
I. Background	1
II. Proceedings Below	3
REASONS FOR DENYING THE PETITION	4
I. This Court Lacks Jurisdiction Over This Matter Because The Decision Of The Illinois Appellate Court Rests On State Law Grounds Independent Of Plaintiffs' Claims Under The Takings Clause And Adequate To Support The Judgment.	6
A. In Illinois, Bail Bond Agreements Are Contracts.	8
B. In Accordance With Illinois Law, The Court Below Properly Found That Plaintiffs Had No Property That Was Taken.	11

Contents

Page

C. The Independent And Adequate State Ground Doctrine Precludes Review Of The Court Below. 15

II. This Case Is Not An Example Of A State Using Private Property Without Compensation. 16

III. Plaintiffs Have Waived Any Procedural Due Process Claims, And Even So, There Is No Due Process Violation, As Plaintiffs Have No Statutory Or Common Law Property Right To The Interest Accrued On Their Bail Bonds. 18

A. Plaintiffs Have Waived Any Procedural Due Process Claim. 18

B. Even If Plaintiffs Did Not Waive Their Purported Due Process Claim, The Decision Below Does Not Conflict With the Due Process Clause. 19

IV. No Split Of Authority Exists Between The Decision Below And The Decisions Of This Court Or Other State Courts. 23

A. No Split of Authority Exists Between The Decision Below and The Decisions of This Court. 23

Contents

Page

B. No Split Of Authority Exists Between The Courts Of Illinois, California and Montana Regarding An Issue Of Federal Law. 26

V. Perceived Misstatements Of Law And Fact In The Petition. 30

CONCLUSION 32

TABLE OF CITED AUTHORITIES

CASES

Page

A-1 Lithoplate, Inc. v. AFS Publishing, 66 Ill. App. 3d 560, 384 N.E.2d 395 (Ill. App. Ct. 1978) 1

Allied Fidelity Ins. Co. v. Brown, 1983 Ohio App. LEXIS 12746 (Ohio Ct. App. 1983) 9

All Star Bonding v. Nevada, 119 Nev. 47, 62 P.3d 1124 (Nev. 2003) 9

Alvarez v. Pappas, 229 Ill. 2d 217, 890 N.E.2d 434 (Ill. 2008) 17

Alvarez v. Smith, 130 S. Ct. 576 (2009) 15

Andrews v. Danaher, 62 Ill. 2d 268, 342 N.E.2d 49 (Ill. 1976) 22

Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972) 12

Bob Cole Bail Bonds, Inc. v. Arkansas, 99 Ark. App. 354, 260 S.W.3d 754 (Ark. Ct. App. 2007) 7, 8, 11

Briones v. Texas, 76 S.W.3d 591 (Ct. App. Tex. 2002) 9

Brown v. Legal Foundation of Washington, 538 U.S. 216 (2003) 23, 24, 26, 31

Cited Authorities

Page

Calcagno v. Personalcare Health Management, Inc., 207 Ill. App. 3d 493, 565 N.E.2d 1330 (Ill. App. Ct. 1991) 13

Canel v. Topinka, 212 Ill. 2d 311, 818 N.E.2d 311 (Ill. 2004) 14, 16

City of Monterey v. Del Monte Dunes, 526 U.S. 687 (1999) 13

Clovis Nat'l Bank v. Calloway, 69 N.M. 119, 364 P.2d 748 (N.M. 1961) 22

Coleman v. Thompson, 501 U.S. 722 (1991) 6, 15

Commonwealth v. Stuyvesant Ins. Co., 366 Mass. 611, 321 N.E.2d 811 (Mass. 1975) 9

Cozart v. Wolf, 185 Ind. 505, 112 N.E. 241 (Ind. 1916) 8

Cullifer v. Georgia, 101 Ga. App. 231, 113 S.E.2d 218 (Ga. Ct. App. 1960) 8

Degen v. United States, 517 U.S. 820 (1996) .. 19, 20

Florida v. Powell, __ U.S. __, 2010 U.S. LEXIS 1898 (February 23, 2010) 5

Cited Authorities

Page

Fresno Firefighters' Local 753 v. Jernagan, 222 Cal. Rptr. 886, 177 Cal. App. 3d 403 (Cal. Ct. App. 1986) 29

Fox Film Corp. v. Muller, 296 U.S. 207 (1935) .. 6

Fuentes v. Shevin, 407 U.S. 67 (1972) 20

Gearing v. Arizona, 24 Ariz. App. 159, 536 P.2d 1051 (Ariz. Ct. App. 1975) 8

Gonzalez v. Danaher, 30 Ill. App. 3d 992, 332 N.E.2d 603 (Ill. App. 1975) 12, 30

Henkels v. Sutherland, 271 U.S. 298 (1926) ... 25, 26

Herb v. Pitcairn, 324 U.S. 117 (1945) 15

Howell v. Mississippi, 543 U.S. 440 (2005) 19

Illinois v. Gates, 462 U.S. 213 (1983) 19

Illinois State Toll Highway Authority v. American Nat'l Bank & Trust Co. of Chicago, 162 Ill. 2d 181, 642 N.E.2d 1249 (1994) 13

Kiefer v. Rust-Oleum Corp., 394 Ill. App. 3d 485, 916 N.E.2d 22 (Ill. App. Ct. 2009) 18

Cited Authorities

Page

Kleinschmidt Inc. v. County of Cook, 287 Ill. App. 3d 312, 678 N.E.2d 1065 (Ill. App. Ct. 1997) 10

Laas v. Wright, 191 S.W.3d 93 (Mo. Ct. App. 2006) 9

Michigan v. Long, 463 U.S. 1032 (1983) 6

Moorman Manufacturing Co. v. National Tank Co., 91 Ill. 2d 69, 435 N.E.2d 443 (1982) 13

Morton Grove Park District v. American National Bank & Trust Co., 78 Ill. 2d 353, 399 N.E.2d 1295 (Ill. 1980) 14

Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306 (1950) 6

Overland v. Superior Court of Los Angeles County, 126 Cal. App. 4th 131, 23 Cal. Rptr. 3d 676 (Cal. Ct. App. 2005), *cert. den.*, 126 S. Ct. 426 (2005) ..... *passim*

In re Palmer, 171 Vt. 464, 769 A.2d 623 (Vt. 2000) 9-10

People v. American Contractors Indemnity Co., 33 Cal. 4th 653, 93 P.2d 1020 (Cal. Ct. App. 2004) 8

Cited Authorities

Page

People v. Carrasquilla, 167 Ill. App. 3d 1069, 522 N.E.2d 139 (Ill. App. Ct. 1988) 5

People v. Harbin, 88 Mich. App. 341, 276 N.W.2d 607 (Mich. Ct. App. 1979) 9

People v. Johnson, 72 Mich. App. 702, 250 N.W.2d 508 (Mich. Ct. App. 1976) 9

People v. Nicholls, 71 Ill. 2d 166, 374 N.E.2d 194 (Ill. 1978) 5

People v. Rubright, 241 Ill. 600, 89 N.E. 713 (Ill. 1909) ..... *passim*

People v. Saint John Tyler, 797 P.2d 22 (Colo. 1990) 8

People v. Stuyvesant Ins. Co., 98 Misc. 2d 210, 413 N.Y.S.2d 843 (N.Y. Sup. Ct. 1979) 9

People v. Woollums, 63 Ill. App. 3d 602, 379 N.E.2d 1385 (Ill. App. 1978) ..... *passim*

Phillips v. Washington Legal Foundation, 524 U.S. 156 (1998) 12, 23, 24, 26-27

Reyes v. McCray, 879 So.2d 1269 (Ct. App. Fla. 2004) 8

Cited Authorities

Page

Robertson v. Goldman, 179 W. Va. 453, 369 S.E.2d 888 (W. Va. 1988) 9

Rodriquez v. People, 191 Colo. 540, 554 P.2d 291 (Colo. 1976) 8

In re Sanford & Sons Bail Bonds, 96 S.W.3d 199 (Tenn. Crim. App. 2002) 9

Schilb v. Kuebel, 404 U.S. 357 (1971) 22

Schilb v. Kuebel, 46 Ill.2d 538 (Ill. 1970) 22

Segura v. Frank, 630 So. 2d 714 (La. 1994) 9

Shell Oil Co. v. Department of Revenue, 95 Ill. 2d 541, 449 N.E.2d 65 (Ill. 1983) 13-14

Shore v. Farmer, 351 N.C. 166, 522 S.E.2d 73 (N.C. 1999) 9

Siroky v. Richland County, 271 Mont. 67, 894 P.2d 309 (Mont. 1995) 10, 28, 29, 30

State v. Baker, 247 Iowa 1224, 78 N.W.2d 411 (Iowa 1956) 9

State v. Braun, 100 Wisc. 2d 77, 301 N.W.2d 180 (Wisc. 1981) 10

Cited Authorities

Page

State v. Brooks, 781 So.2d 929 (Ct. App. Miss. 2001) 9

State v. Ellis, 272 A.2d 357 (Me. 1971) 9

State v. Emery, 12 Ore. App. 37, 504 P.2d 1405 (Or. Ct. App. 1973) 9

State v. Ericksons, 106 N.M. 567, 746 P.2d 1099 (N.M. 1987) 9

State v. Garvin, 242 Conn. 296, 699 A.2d 921 (Conn. 1997) 8

State v. Gioradano, 283 N.J. Super. 323, 661 A.2d 1311 (N.J. Super. Ct. App. Div. 1995) 9

State v. Indemnity Ins. Co., 9 Kan. App. 2d 53, 672 P.2d 251(Kan. Ct. App. 1983) 9

State v. Kennedy, 193 Neb. 472, 227 N.W.2d 607 (Neb. 1975) 9

State v. Krage, 404 N.W.2d 524 (S.D. 1987) 9

State v. McClinton, 369 S.C. 167, 631 S.E.2d 895 (S.C. 2006) 9

State v. Mitchell, 212 A.2d 873, 59 Del. 11 (Del. Super. Ct. 1965) 8

Cited Authorities

Page

State v. Nelson, 20 Utah 2d 229, 436 P.2d 792 (Utah 1968) 9

State v. Norton, 347 S.W.2d 849 (Mo. 1961) 9

State v. Otis Elevator Co., 12 N.J. 1, 95 A.2d 715 (N.J. 1953) 22

State v. Phoenix Sav. Bank & Trust Co., 60 Ariz. 138, 132 P.2d 637 (Ariz. 1942) 22

State v. Rocha, 131 Idaho 113, 952 P.2d 1249 (Idaho Ct. App. 1998) 8, 11

State v. Sav. Union Bank & Trust Co., 186 Cal. 294, 199 P. 26 (Cal. 1921) 21

State v. Vaughn, 2000 OK 63, 11 P.3d 211 (Okla. 2000) 9

Swift v. Esdale, 293 Ala. 520, 306 So. 2d 268 (Ala. 1975) 8

Turnipseed v. Brown, 391 Ill. App. 3d 88, 908 N.E.2d 546 (Ill. App. Ct. 1978) ..... *passim*

United States v. $ 8,850, 461 U.S. 555 (1983) ... 20

United States v. James Daniel Good Real Property, 510 U.S. 43 (1993) 20

Cited Authorities

Page

United States v. Santiago, 826 F.2d 499 (7th Cir. 1987) 8, 10

Webb's Fabulous Pharmacies v. Beckwith, 449 U.S. 155 (1980) ..... *passim*

Wiegand v. Maryland, 363 Md. 186, 768 A.2d 43 (Md. Ct. App. 2001) 9

Zoller v. Arkansas, 284 Ark. 118, 680 S.W.2d 87 (Ark. 1984) 8

STATUTES

725 ILCS 5/110-7 (2010) ..... *passim*

Cook County Ordinance 93-O-45 2

28 U.S.C. § 1257 19

42 U.S.C. § 1983 19

RULES

Rule 15(2) 30

STATEMENT OF THE CASE

I. Background.

As the trial court in this matter recognized, "a bail bond is a form of contract between the government on the one part and the accused and surety on the other." (Pet. App. 28.) When an individual enters into this bail bond contract, the Clerk of the Circuit Court of Cook County, Illinois (the "Circuit Clerk") receives bail bond money under the authority of the court and keeps the money solely to be disposed of as directed by statute. *See* 725 ILCS 5/110-7 (2010); *see also A-1 Lithoplate, Inc. v. AFS Publishing*, 66 Ill. App. 3d 560, 562, 384 N.E.2d 395, 396 (Ill. App. Ct. 1978).

Section 5/110-7 of the Illinois Code of Criminal Procedure ("Section 110-7") states that if the bailed person satisfies the bond's requirements and has been fully discharged from all obligations, the Circuit Clerk returns an amount up to 90% of the bail bond deposit and retains the remaining 10% as "bail bond costs." (725 ILCS 110-7(f); Pet. App. 66.) If a person fails to meet the conditions of the bail bond, the circuit court may enter an order of forfeiture and the State's Attorney may institute proceedings to have the bail bond money declared forfeited and for the entry of judgment on the balance of the bond account. (Pet. App. 66.) Section 110-7 does not direct that the Circuit Clerk give the person posting bail the interest earned on the bail deposit when it is returned to them. (*See* 725 ILCS 110-7; Pet. App. 66.)

Upon the execution of bail bonds, the Circuit Clerk places such funds in an interest bearing account, or interest bearing instruments. (Pet. App. 66.) This is pursuant to Cook County Ordinance 93-O-45, which provides: "All elected and appointed public officials of Cook County are directed to invest public funds in their possession or for which they are custodians in interest-bearing accounts . . . ." (Pet. App. 47.)

On or about February 2, 2002, plaintiffs Darniece Bailey Turnipseed and Ramon Turnipseed executed a bail bond known as a "D" bond[1] for Ms. Turnipseed and posted $100 in cash for the $1,000 bail that an Illinois criminal court set for her. (Pet. App. 70.) After Darniece Bailey Turnipseed satisfied all of the terms of her bail, the Circuit Clerk returned $90 to her. (Pet. App. 70.) In a similar vein, Plaintiffs allege that plaintiff Raymond Thomas[2] executed a "D bond" by posting $17,500 in cash for the $175,000 bail that an Illinois court set for his brother. (Pet. App. 70.) Plaintiffs allege that after all of the conditions of the bond were satisfied, the Circuit Clerk returned $15,750 to Thomas (*i.e.*, the amount of bond minus 10%). (Pet. App. 70-71.)

---

1. As the trial court stated, "a 'D' bond is a 'deposit bond.' The issuing judge sets the amount of bail and the defendant is required to post 10% of that amount in order to obtain release." (Pet. App. 26.) A "D" bond is issued under Section 110-7. *See* 725 ILCS 110-7 (2010).

2. Petitioners Thomas, Darniece Bailey Turnipseed and Ramon Turnipseed will hereinafter be referred to as "Plaintiffs."

II. Proceedings Below.

Plaintiffs filed a complaint against respondents Cook County (the "County") and the Circuit Clerk (collectively "Defendants") alleging that: (a) interest on bail bond deposits was private property that belonged to Plaintiffs; and (b) Defendants violated the Takings Clauses of the United States and Illinois Constitutions when such interest was deposited in the county treasury. Plaintiffs subsequently amended their complaint. (Pet. App. 62-79.) Plaintiffs also moved for class certification. (Pet. App. 2.)

Defendants moved to dismiss Plaintiffs' Second Amended Complaint, Pet. App. 8-9, and filed a response to Plaintiffs' motion for class certification. (Pet. App. 24, 39.)

On August 19, 2008, the circuit court entered an order denying Defendants' motion to dismiss and granting Plaintiffs' motion for class certification. (Pet. App. 23-41.) On September 18, 2008, Defendants filed a petition for leave to appeal this interlocutory order to the Illinois Appellate Court pursuant to Illinois Supreme Court Rule 306(a)(8). On October 16, 2008, the Illinois Appellate Court entered an order granting Defendants' petition for leave to appeal. (Pet. App. 9.)

On May 4, 2009, the Illinois Appellate Court issued an opinion reversing the trial court's orders certifying Plaintiffs' lawsuit as a class action and denying Defendants' motion to dismiss. (Pet. App. 1-22.) The Illinois Appellate Court found that "plaintiffs failed to state a valid cause of action, and thus their suit must be dismissed." (Pet. App. 22.)

Plaintiffs then filed a petition for leave to appeal to the Illinois Supreme Court. On September 30, 2009, the Illinois Supreme Court denied Plaintiffs' petition for leave to appeal. (Pet. App. 43.)

REASONS FOR DENYING THE PETITION

As a matter of Illinois law, no property interest of Plaintiffs was taken and on that State law basis, Plaintiffs' claims under the Takings Clause were properly dismissed. *Turnipseed v. Brown*, 391 Ill. App. 3d 88, 100, 908 N.E.2d 546, 555-556 (Ill. App. Ct. 1978). (Pet. App. 1-22.) The court below also found that Section 110-7(f):

> requires the clerk to pay 90% of the bail amount to "the accused or to the defendant's designee." The subsection is completely silent about interest. Although subsection (f) is detailed in many respects, it does not use the word "interest" once.

Id., 391 Ill. App. at 91, 908 N.E.2d at 548. (Pet. App. 5.) Plaintiffs acknowledge that Section 110-7 does not direct the return of interest earned on cash that is ultimately returned to the party who posted the cash. (Pet. App. 74.)[3] The court below found that Plaintiffs

---

3. Even if the criminal defendant satisfies the conditions of bail, the person who posted bail may receive less than 90% of the funds posted, as Illinois law allows bail funds to be applied to other obligations. *See, e.g., Turnipseed*, 391 Ill. App. at 94, 908 N.E.2d at 550 (stating that "bail bond money may be used to pay court costs, attorney fees, child support obligations, and financial obligations of the defendant incurred in a different (Cont'd)

did not retain any private property interest in the bail bond posted under Section 110-7 and had no contractual, statutory or common law right to interest on cash ultimately paid to them pursuant to their bail bond contracts. *Id.* at 391 Ill. App. 3d at 96-97, 908 N.E.2d at 554-555. The court below, therefore, determined that under Illinois law, Plaintiffs did not have a property right taken from them. *Id.*

As a result, the dismissal of Plaintiffs' claims under the Takings Clause rests on adequate and independent state law grounds, and this Court lacks subject matter jurisdiction to review this decision. *See, e.g., Florida v. Powell*, __ U.S. __, 2010 U.S. LEXIS 1898, *11-*12 (February 23, 2010) (recognizing that this Court will not review a question of federal law decided by a state court if the decision rests on a state law ground that is independent of the federal question and adequate to support the judgment).

In addition, the non-availability of interest accrued on cash paid pursuant to Illinois bail bond contracts is not an example of a State using private property without compensation, as Plaintiffs have no property right to such interest.

(Cont'd)

case"). *See also People v. Carrasquilla*, 167 Ill. App. 3d 1069, 1076, 522 N.E.2d 139, 143 (Ill. App. Ct. 1988) (Section 110-7 authorizes courts to apply bail deposits to pay fines in criminal cases, even where third-party claims on the funds exist); *People v. Nicholls*, 71 Ill. 2d 166, 374 N.E.2d 194 (Ill. 1978) (interpreting Section 110-7(h) to allow cash bail deposits to be used to pay the costs of an unsuccessful appeal.)

Moreover, Plaintiffs did not advance a procedural due process claim below. In any event, because Plaintiffs had no property right in the interest accrued on their bail bond deposits, the decision below did not sanction the summary forfeiture of property rights in contravention of cases from this Court, such as *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950), requiring notice and an opportunity to be heard prior to the deprivation of property.

Finally, the decision below does not conflict with any decisions from this Court or other State court decisions interpreting federal law.

Accordingly, and for the reasons set forth below, this Court should deny the Petition.

I. This Court Lacks Jurisdiction Over This Matter Because The Decision Of The Illinois Appellate Court Rests On State Law Grounds Independent Of Plaintiffs' Claims Under The Takings Clause And Adequate To Support The Judgment.

It is well established that "[t]his Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991), *citing Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935). *See also Michigan v. Long*, 463 U.S. 1032, 1041 (1983) (stating that when the state court decision "indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.")

The application of Illinois law with regard to Plaintiffs' claims under the Takings Clause can be summarized as follows:

- Under Illinois law, a bail bond agreement is a contract. *People v. Rubright*, 241 Ill. 600, 603, 89 N.E. 713, 714 (Ill. 1909); *People v. Woollums*, 63 Ill. App. 3d 602, 606, 379 N.E.2d 1385, 1388-1389 (Ill. App. 1978);

- The terms of this contract are the terms of the statute. *See* 725 ILCS 5/110-7 (2010); *Bob Cole Bail Bonds, Inc. v. Arkansas*, 260 S.W.3d 754, 99 Ark. App. 354, 357 (Ark. Ct. App. 2007);

- The bail bond contract does not call for the payment of up to 90% of cash posted plus interest. The contract only calls for the payment of cash in accordance with the statutory formula in Section 110-7(f) (in an amount up to 90% of the cash posted), subject to other obligations that the person posting the bond may have. *See Turnipseed*, 391 Ill. App. 3d at 92-93, 908 N.E.2d at 549-550; (Pet. App. 7-8); 725 ILCS 5/110-7(f) (2010); and

- As a result, Plaintiffs' property right is their contractual right to payment of the sum indicated by operation of the statutory formula and nothing more. *Turnipseed*, 391 Ill. App. 3d at 96-97, 908 N.E.2d at 554-555. (Pet. App. 15.)

Because the State took no property from Plaintiffs, the court below held that their claims under the Takings Clause failed as a matter of law. *Turnipseed*, 391 Ill. App. 3d at 100, 908 N.E.2d at 555 (stating that because "plaintiffs have no right to the interest, there can be no taking of it"). (Pet. App. 21-22.) Significantly, this holding is based on Illinois law, is independent of the federal question and is adequate to support the judgment.

A. In Illinois, Bail Bond Agreements Are Contracts.

Illinois courts have long held that a bail bond agreement is a contract, as have at least forty other States.[4] *United States v. Santiago*, 826 F.2d 499, 502-

---

4. *See* **Alabama**: *Swift v. Esdale*, 293 Ala. 520, 524, 306 So. 2d 268, 272 (Ala. 1975); **Arizona**: *Gearing v. Arizona*, 536 P.2d 1051, 1052 (Ariz. Ct. App. 1975); **Arkansas**: *Bob Cole Bail Bonds, Inc. v. Arkansas*, 99 Ark. App. 354, 357, 260 S.W.3d 754 (Ark. Ct. App. 2007), *Zoller v. Arkansas*, 284 Ark. 118, 120, 680 S.W.2d 87, 89 (Ark. 1984); **California**: *People v. American Contractors Indemnity Co.*, 33 Cal. 4th 653, 657, 93 P.2d 1020, 1022 (Cal. Ct. App. 2004), *Overland v. Superior Court of Los Angeles County*, 126 Cal. App. 4th 131, 141, 23 Cal. Rptr. 3d 676, 683 (Cal. Ct. App. 2005); **Colorado**: *People v. Saint John Tyler*, 797 P.2d 22, 25-26 (Colo. 1990), *Rodriquez v. People*, 191 Colo. 540, 541, 554 P.2d 291, 293 (1976); **Connecticut**: *State v. Garvin*, 242 Conn. 296, 305, 699 A.2d 921, 925-926 (Conn. 1997); **Delaware**: *State v. Mitchell*, 212 A.2d 873, 884 (Del. Super. Ct. 1965); **Florida**: *Reyes v. McCray*, 879 So.2d 1269, 1271 (Fla. Dist. Ct. App. 2004); **Georgia**: *Cullifer v. Georgia*, 101 Ga. App. 231, 113 S.E.2d 218 (Ga. Ct. App. 1960); **Idaho**: *State v. Rocha*, 131 Idaho 113, 116, 952 P.2d 1249, 1252 (Idaho Ct. App. 1998); **Indiana**: *Cozart v. Wolf*, 185 Ind. 505, 511-512, 112 N.E. 241, 242 (Ind. 1916); **Illinois**
(Cont'd)

(Cont'd)
People v. Rubright, 241 Ill. 600, 603 89 N.E. 713 (Ill. 1909), *People v. Woollums*, 63 Ill. App. 3d 602, 606 (Ill. App. Ct. 1978); **Iowa**: *State v. Baker*, 247 Iowa 1224, 1228,78 N.W.2d 411, 414 (Iowa 1956); **Kansas**: *State v. Indemnity Ins. Co.*, 9 Kan. App. 2d 53, 55, 672 P.2d 251, 253 (Kan. Ct. App. 1983) **Louisiana**: *Segura v. Frank*, 630 So. 2d 714, 719 (La. 1994); **Maine**: *State v. Ellis*, 272 A.2d 357, 358 (Me. 1971); **Maryland**: *Wiegand v. Maryland*, 363 Md. 186, 197, 768 A.2d 43, 49 (Md. Ct. App. 2001); **Massachusetts**: *Commonwealth v. Stuyvesant Ins. Co.*, 366 Mass. 611, 616, 321 N.E.2d 811, 816 (Mass. 1975); **Michigan**: *People v. Harbin*, 88 Mich. App. 341, 343, 276 N.E.2d 607, 609 (Mich. Ct. App. 1979), *People v. Johnson*, 72 Mich App. 702, 707, 250 N.W.2d 508, 511 (Mich. Ct. App. 1976); **Mississippi**: *State v. Brooks*, 781 So.2d 929, 934 (Miss. Ct. App. 2001); **Missouri**: *Laas v. Wright*, 191 S.W.3d 93, 98-99 (Mo. Ct. App. 2006), *State v. Norton*, 347 S.W.2d 849, 855 (Mo. 1961); **Nebraska**: *State v. Kennedy*, 193 Neb. 472,474, 227 N.W.2d 607, 609 (Neb. 1975); **Nevada**: *All Star Bonding v. Nevada*, 119 Nev. 47, 49, 62 P.3d 1124, 1126 (Nev. 2003); **New Jersey**: *State v. Gioradano*, 283 N.J. Super. 323, 329, 661 A.2d 1311, 1314 (N.J. Super. Ct. App. Div. 1995); **New Mexico**: *State v. Ericksons*, 106 N. M. 567, 568, 746 P.2d 1099, 1100 (N.M. 1987); **New York**: *People v. Stuyvesant Ins. Co.*, 98 Misc. 2d 210, 413 N.Y.S.2d 843 (N.Y. Sup. Ct. 1979); **North Carolina**: *Shore v. Farmer*, 351 N.C. 166, 522 S.E.2d 73 (N.C. 1999); **Ohio**: *Allied Fidelity Ins. Co. v. Broum*, 1983 Ohio App. LEXIS 12746 (Ohio Ct. App. 1983); **Oklahoma**: *State v. Vaughn*, 2000 OK 63, 11 P.3d 211, 214 (Okla. 2000); **Oregon**: *State v. Emery*, 12 Ore. App. 37, 40, 504 P.2d 1405, 1407 (Or. Ct. App. 1973); **South Carolina**: *State v. McClinton*, 369 S.C. 167, 171, 631 S.E.2d 895, 897 (S.C. 2006); **South Dakota**: *State v. Krage*, 404 N.W.2d 524, 526 (S.D. 1987); **Tennessee**: *In re Sanford & Sons Bail Bonds*, 96 S.W.3d 199, 202 (Tenn. Crim. App. 2002); **Texas**: *Briones v. Texas*, 76 S.W.3d 591, 595 (Tex. Ct. App. 2002); **Utah**: *State v. Nelson*, 20 Utah 2d 229, 231, 436 P.2d 792, 793 (Utah 1968); **West Virginia**: *Robertson v. Goldman*, 179 W. Va. 453, 456, 369 S.E.2d 888, 891 (W. Va. 1988); **Vermont**: *In re Palmer*,
(Cont'd)

503 (7th Cir. 1987) (recognizing that under Illinois law, a bail bond is a contract); *Rubright*, 241 Ill. at 603, 89 N.E. at 713-714 (holding that a bail bond is a contract); *Woollums*, 63 Ill. App. 3d at 606, 379 N.E.2d at 1388-1389 (same). Illinois and other States are free to recognize bail bond agreements pursuant to a statutory scheme as contracted agreements.[5]

Under their bail bond contract, Plaintiffs were entitled to a payment of up to 90% of the cash posted for their bond, provided that they satisfied the terms of the agreement. *See Turnipseed*, 391 Ill. App. 3d at 93, 908 N.E.2d at 549. The bail bond agreement did not provide for the payment of interest accrued on cash returned pursuant to the contract. *Id.*, 391 Ill. App. 3d at 96, 908 N.E.2d at 552. (Pet. App. 8.)

Thus, Defendants' refusal to pay Plaintiffs interest on their bail bonds does not constitute a "taking" because Defendants did not confiscate Plaintiffs' private property. *Id. See also Kleinschmidt Inc. v. County of Cook*, 287 Ill. App. 3d 312, 678 N.E.2d 1065 (Ill. App. Ct. 1997) (holding that a landowner who voluntarily entered into a contract to sell land in lieu of condemnation could not later file a claim under the Takings Clause of the United States and Illinois Constitutions.) Instead, Plaintiffs voluntarily paid cash in order to free criminal

---

(Cont'd)
171 Vt. 464, 470, 769 A.2d 623, 627 (Vt. 2000); and **Wisconsin**: *State v. Braun*, 100 Wisc. 2d 77, 83, 301 N.W.2d 180, 183 (Wisc. 1981).

5. Montana, for example, does not appear to hold that a bail bond agreement is a contract. *See Siroky v. Richland County*, 271 Mont. 67, 894 P.2d 309 (Mont. 1995).

defendants from custody and, in so doing, entered into contracts. *See Rubright*, 241 Ill. at 603, 89 N.E. at 713-714; *Woollums*, 63 Ill. App. 3d at 606, 379 N.E.2d at 1388-1389.

Because a bail bond "is a contract, existing law becomes part of the contract, as though the contract contains an express provision to that effect." *State v. Rocha*, 131 Idaho 113, 116, 952 P.2d 1249, 1252 (Idaho Ct. App. 1998). Indeed, any "statutes or rules that relate to a bail bond are implicitly read into the bail-bond contract." *Bob Cole Bail Bonds, Inc. v. Arkansas*, 99 Ark. App. at 357. In Illinois, Section 110-7 sets forth the terms of Plaintiffs' bail bond contracts. Section 110-7(f) provides for nothing more than the payment of up to 90% of the bail deposit upon completion of the bail bond agreement.

B. In Accordance With Illinois Law, The Court Below Properly Found That Plaintiffs Had No Property That Was Taken.

In determining whether Plaintiffs stated a viable claim under the Takings Clause, the court below considered whether Plaintiffs had a property right to interest that accrued on the amount of cash ultimately paid to Plaintiffs pursuant to the bail:

> Since there can be no taking, unless there was a right to the thing allegedly taken, we will consider first whether plaintiffs had a right to the interest. . . There is no statute or contract which gave plaintiffs a right to the interest. As noted above, the statute is silent

> concerning interest. 725 ILCS 5/110-7(f) (West 2006). To the extent that the statute formed the basis of a contract, then this contract was also silent about interest.

Turnipseed, 391 Ill. App. 3d at 96, 908 N.E.2d at 552. (Pet. App. 14-15.) Following its prior decision in *Gonzalez v. Danaher*, 30 Ill. App.3d 992, 332 N.E.2d 603 (Ill. App. Ct. 1975), the court below then found that under Illinois law, Plaintiffs had no property right taken by Defendants:

> A plaintiff must have a legal right to property, before he or she can claim there was a taking; and in *Gonzalez*, we found that an accused had no legal right to the interest that had accrued on his bail deposit — no statutory right, no contract right and no common-law right. *Gonzalez*, 30 Ill. App. 3d at 994. Without a legal right, there can be no basis for plaintiffs' claims under the takings clauses; and thus *Gonzalez* precludes their claims, even though the word "taking" was not used in that case.

Turnipseed, 391 Ill. App. 3d at 98, 908 N.E.2d at 554, *citing Gonzalez*, 30 Ill. App. 3d at 994, 332 N.E.2d at 604-605. (Pet. App. 18.)

State law creates property interests, not the Federal Constitution. *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998) *citing Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564, 577 (1972). Plaintiffs' property interests in this case derive from the bail bond contracts into which Plaintiffs entered, the terms of

which are set forth in Section 110-7. Drawing on two sources of Illinois law (statutes and the common law of contracts), the court below determined that Section 110-7 created no property right to interest.[6]

Not surprisingly, the court below explicitly stated that it had a duty to "consider all nonconstitutional issues, before proceeding to rule on a constitutional ground." *Id.*, 391 Ill. App. 3d 96, 908 N.E.2d 552. (Pet. App. 15.) In so doing, the court concluded that persons who pay bail bond money do not retain ownership rights in such money pursuant to the bail bond contract.

Discussing Illinois case law and particularly *Shell Oil Co. v. Department of Revenue*, 95 Ill. 2d 541, 449

---

6. Defendants advanced another State law basis for denying Plaintiffs' claims under the Takings Clause. In Illinois, a claim for interest is really a claim for compensation for the loss of use of money. *Illinois State Toll Highway Authority v. American Nat'l Bank & Trust Co. of Chicago*, 162 Ill. 2d 181, 199, 642 N.E.2d 1249, 1257 (1994). Defendants argued that Plaintiffs' Takings Clause claims for interest were constitutional tort claims, *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 709, (1999), and that Illinois' economic loss doctrine also barred Plaintiffs from bringing claims for interest in tort that they could not bring under the bail bond contracts. *See Moorman Manufacturing Co. v. National Tank Co.*, 91 Ill. 2d 69, 435 N.E.2d 443 (1982). *See also Calcagno v. Personalcare Health Management, Inc.*, 207 Ill. App. 3d 493, 501, 565 N.E.2d 1330, 1335 (Ill. App. Ct. 1991) (stating that the loss of the use of money is an economic loss that the *Moorman* doctrine precludes in tort). Because the appellate court below held that no property of Plaintiffs was taken, it declined to "reach defendants' argument based on the *Moorman* doctrine." *Turnipseed*, 391 Ill. App. 3d at 100-101, 908 N.E.2d at 556. (Pet. App. 22.)

N.E.2d 65 (Ill. 1983), *Morton Grove Park District v. American National Bank & Trust Co.*, 78 Ill. 2d 353, 399 N.E.2d 1295 (Ill. 1980) and *Canel v. Topinka*, 212 Ill. 2d 311, 818 N.E.2d 311 (Ill. 2004), the court below noted, "the depositors [in those cases] expected to be restored to their full ownership rights at the conclusion of the dispute." *Turnipseed*, 391 Ill. App. 3d 99, 908 N.E.2d 555. "By contrast," the court explained, "in the case at bar, there are many reasons why the depositors may not receive back all of the bail money." *Id.*, 391 Ill. App. 3d 100, 908 N.E.2d 555. (Pet. App. 21.) "Thus, depositors of bail bond money do not necessarily expect to receive their money back, even if the accused appears in court." *Id.* (Pet. App. 21.)

As a matter of Illinois law, bail bond money paid pursuant to Section 110-7 does not remain the private property of the payor and, thus, no constitutional question arises as to interest accrued on bail bond money paid to the State. Instead, a payor retains only a contractual right to payment of the statutory amount upon successful completion of his or her contractual obligations.

Consequently, the decision below ordering the dismissal of Plaintiffs' claims under the Takings Clause rests on an independent state law ground that is adequate to sustain the judgment of the court below.

C. The Independent And Adequate State Ground Doctrine Precludes Review Of The Court Below.

In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional. *Coleman*, 501 U.S. at 729. "[B]ecause this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory." *Id., citing Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945) ("We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion").

This Court recently observed that it does not decide "abstract dispute[s] about the law." *Alvarez v. Smith*, 130 S. Ct. 576, 580-581 (2009) (holding that a "dispute solely about the meaning of a law, abstracted from any concrete actual or threatened harm, falls outside the scope of the constitutional words 'Cases' and 'Controversies'" in Article III). Review of the judgment below would constitute an advisory opinion, as this Court cannot review the decision of a State court construing State law. On this basis alone, this Court should deny the Petition.

II. This Case Is Not An Example Of A State Using Private Property Without Compensation. (Response to Plaintiffs' Petition at 22-23.)

In the present case, when Plaintiffs posted bail, they paid 10% of the bail amounts set by an Illinois court. In so doing, Plaintiffs entered into a contract, *Rubright*, 241 Ill. at 603, 89 N.E. at 713-714 and *Woollums*, 63 Ill. App. 3d at 606, 379 N.E.2d at 1388-1389, and relinquished control to the title of the cash they paid. In this respect, the present case is readily distinguishable from cases where an owner seeks interest on unclaimed property that the State had been holding on behalf of the owner. *See* Petition at 22-23, *citing Canel v. Topinka*, 212 Ill. 2d 311, 818 N.E.2d 311 (Ill. 2004). In *Canel*, for example, the plaintiff owned stock that the State of Illinois had been holding as unclaimed property. As the court below explained in construing Illinois law, in cases such as *Canel*, "the depositors expected to be restored to their full ownership rights at the conclusion of the dispute." *Turnipseed*, 391 Ill. App. 3d at 199, 908 N.E.2d at 555. (Pet. App. 20.) The plaintiff in *Canel* always retained full ownership of the stock, and title for the stock never passed to the government.

Here, Plaintiffs did not retain title to the money they paid pursuant to the bail bond agreement. They instead transferred all interest in their money to the government and retained only a *contractual* right to

the payment of an amount up to 90% of these bail deposits.[7]

Unlike the government entities in the cases that Plaintiffs cite, the Circuit Clerk was not acting as custodian of Plaintiffs' property. Rather, the Circuit Clerk administers a contract between Plaintiffs and the State in which Plaintiffs could receive a maximum amount equal to 90% of their bail if they complied with the terms of the bail and lesser amounts (depending upon statutory setoffs) down to 0%, if they did not comply with the terms of the contract. Plaintiffs' contention that the State was using Plaintiffs' private property without compensation is legally erroneous because it ignores the effect of the parties' respective contractual rights, particularly the Plaintiffs' right to receive the return of up to 90% of cash posted pursuant to Section 110-7(f).

---

7. *Compare Alvarez v. Pappas*, 229 Ill. 2d 217, 890 N.E.2d 434 (2008) (holding that a taxpayer who overpays his or her taxes does not *own* such overpayments but rather has a *statutory right* to seek a refund). While *Alvarez v. Pappas* concerns a statutory right to a tax refund as opposed to a contractual right under a bail bond agreement, the case is nonetheless analogous. Just as a taxpayer who overpays his taxes does not own the overpaid taxes but rather a statutory right to a refund, a person who pays cash pursuant to a bail bond agreement does not own the cash but rather has a contractual right to payment of a sum of money, upon satisfaction of the contractual conditions of the bond.

III. Plaintiffs Have Waived Any Procedural Due Process Claims, And Even So, There Is No Due Process Violation, As Plaintiffs Have No Statutory Or Common Law Property Right To The Interest Accrued On Their Bail Bonds.

(Response to Plaintiffs' Petition at 20-21.)

A. Plaintiffs Have Waived Any Procedural Due Process Claim.

Plaintiffs present for review an issue that was not raised below: "Whether the immediate and automatic forfeiture of the interest earned by the County on Plaintiffs' private property – the interest earned on their bail bond deposits – violates due process." This question appears to frame a procedural due process claim. However, no such issue is raised by any claim in Plaintiffs' Second Amended Complaint, the operative pleading before this Court, and this issue was neither advanced by Plaintiffs nor addressed by the courts below. Under Illinois law, Plaintiffs have waived this argument. *See, e.g., Kiefer v. Rust-Oleum Corp.*, 394 Ill. App. 3d 485, 493, 916 N.E.2d 22, 28 (Ill. App. 2009) (holding that "arguments not raised in the trial court or argued in the appellant's brief on appeal are waived").

Further, Count I of the Second Amended Complaint purports to state a facial taking claim under the Fifth Amendment to the United States Constitution, as well as Article I, §15 of the Illinois Constitution, on the basis that private property may not be taken for public use without just compensation. (Pet. App. 73-75; Second Am. Compl., ¶¶ 32-36, 38.) Count II of the Second

Amended Complaint, which is seemingly duplicative of Count I, purports to state a claim under 42 U.S.C. § 1983 for violation of Plaintiffs' rights under the Fifth and Fourteenth Amendments to the United States Constitution, for the alleged taking of Plaintiffs' private property without just compensation. (*See* Pet. App. 76-78; Second Am. Compl., ¶¶ 44-49, 51.) Because no procedural due process claim was raised below, nor addressed by the lower courts, Defendants object to its presentation here and certiorari should not be granted on this question. *See Howell v. Mississippi*, 543 U.S. 440, 441, 125 S. Ct. 856, 857 (2005)(writ of certiorari dismissed as improvidently granted where federal constitutional issue not raised in, or addressed by, state supreme court); *Illinois v. Gates*, 462 U.S. 213, 217-19, 103 S. Ct. 2317, 2320-22 (1983) (under 28 U.S.C. § 1257, this Court will refrain from deciding questions not presented or decided in the highest court of the state whose judicial action the court is called upon to review).

B. Even If Plaintiffs Did Not Waive Their Purported Due Process Claim, The Decision Below Does Not Conflict With the Due Process Clause.

Plaintiffs assert that the failure to pay interest that accrued on a bond amounts to a forfeiture of private property without a hearing in violation of the Due Process Clause. *See* Petition at 20, *citing Degen v. United States*, 517 U.S. 820, 822 (1996). Plaintiffs' position is legally groundless.

In *Degen*, this Court stated "[i]n an ordinary case a citizen has a right to a hearing to contest the forfeiture of his property, a right secured by the Due Process Clause." *Degen*, 517 U.S. at 822, *citing United States* v. *James Daniel Good Real Property*, 510 U.S. 43, 48-62 (1993) and *Fuentes* v. *Shevin*, 407 U.S. 67, 80 (1972). This Court has recognized the "general rule that individuals must receive notice and an opportunity to be heard before the Government deprives them of property." *James Daniel Good*, 510 U.S. at 48, *citing United States* v. *$ 8,850*, 461 U.S. 555, 562, n.12 (1983). Prejudgment replevin statutes, for example, require notice and an opportunity to be heard. *Fuentes*, 407 U.S. at 80.

Here, in marked contrast, the court below found that Plaintiffs have no property right to any money other than the amount to which they are contractually entitled. *Turnipseed*, 391 Ill. App. 3d at 96-97, 908 N.E.2d at 554-555. Without the existence of a property right to interest, Plaintiffs' claim that such property was taken without due process fails.

Plaintiffs also argue that the existence of accrued interest on Plaintiffs' bail bond funds should trigger the statutory standards found in 725 ILCS 110-7(g) for the forfeiture of the deposit itself. (Petition at 21.) Once again, this argument fails, as Plaintiffs have no property right in accrued interest under Illinois law. As the decision below held, "the legislature did not intend to confer a statutory right to recover interest" and "plaintiffs have no common law right to recover interest." *Turnipseed*, 391 Ill. App. 3d at 100, 908 N.E.2d at 555. (Pet. App. 21.) Because "plaintiffs have no right

to interest, there can be no taking of it." *Id.* (Pet. App. 22.) Thus, as to any interest accrued on Plaintiffs' bail bond funds, Defendants need not comply with forfeiture standards under 725 ILCS 110-7(g).[8]

Furthermore, the cases that Plaintiffs cite in support of their due process argument are inapplicable to the present case. In *State v. Sav. Union Bank & Trust Co.*, 186 Cal. 294, 199 P. 26 (Cal. 1921), for example, the California Supreme Court held that some judicial proceeding is necessary to perfect an escheat. Likewise,

---

8. 725 ILCS 110-7(g) states as follows in pertinent part:

> "[i]f the accused does not comply with the conditions of the bail bond the court having jurisdiction shall enter an order declaring the bail to be forfeited. Notice of such order of forfeiture shall be mailed forthwith to the accused at his last known address. If the accused does not appear and surrender to the court having jurisdiction within 30 days from the date of the forfeiture or within such period satisfy the court that appearance and surrender by the accused is impossible and without his fault the court shall enter judgment for the State if the charge for which the bond was given was a felony or misdemeanor, or if the charge was quasi-criminal or traffic, judgment for the political subdivision of the State which prosecuted the case, against the accused for the amount of the bail and costs of the court proceedings."

725 ILCS 110-7(g) (2010). Nothing in this statute refers to the interest accrued on Plaintiffs' bail bond funds. Furthermore, because the contractual agreement between the County and those posting the bail bond funds is silent as to interest, 725 ILCS 110-7(g) has no application to interest accrued on such funds.

in *State v. Phoenix Sav. Bank & Trust Co.*, 60 Ariz. 138, 132 P.2d 637 (Ariz. 1942), the Arizona Supreme Court found that the state escheat statute was unconstitutional because it failed to require the State to escheat a deposit only when it provided for a judicial determination of the jurisdictional facts, which are (a) death, and (b) lack of heirs and intestacy, and because it failed to give proper opportunity for all persons interested in the deposit to appear and contest these two issues. Similarly, both *Clovis Nat'l Bank v. Calloway*, 69 N.M. 119, 364 P.2d 748 (N.M. 1961) and *State v. Otis Elevator Co.*, 12 N.J. 1, 95 A.2d 715 (N.J. 1953) involve specific, procedural challenges to the states' escheat statutes.

The present case is more analogous to *Schilb v. Kuebel*, 46 Ill.2d 538, 544 (1970), and *Schilb v. Kuebel*, 404 U.S. 357 (1971), where this Court considered the constitutional validity of assessing costs against a bail deposit. In *Schilb*, the Illinois Supreme Court upheld the constitutionality of section 110-7(f) (Ill. Rev. Stat. 1983, ch. 38, par. 110-7(f)), which allowed the clerk of the court to retain 10% of the bond deposit for administrative costs, as conforming to fundamental concepts of due process and equal protection of the law. In affirming this decision, this Court stated that the situation "is not one where we may assume that the Illinois plan works to deny relief to the poor man merely because of his poverty." *Schilb*, 404 U.S. at 370. Subsequently, in *Andrews v. Danaher*, 62 Ill. 2d 268 (1976), the Illinois Supreme Court upheld the same provision against the claim that the State unlawfully imposed a fee upon the accused for exercising his constitutional right to bail.

Plaintiffs have not stated a due process claim and the decision below does not conflict due process cases from this Court.

IV. No Split Of Authority Exists Between The Decision Below And The Decisions Of This Court Or Other State Courts.

The decision below does not conflict with any decisions of this Court. Furthermore, the decision below does not conflict with other State courts regarding an issue of federal law.

A. No Split of Authority Exists Between The Decision Below and The Decisions of This Court.

(Response to Petition at 12-18.)

The decision below does not conflict with this Court's decisions in *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980), *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998) and *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003). Plaintiffs contend, however, that this Court's holding in these cases that interest earned on private property is itself private property, which the government cannot retain without compensating its owner, is applicable in the present case. (Petition at 15.) It is not, as Plaintiffs do not own property being held by the State. *See Turnipseed*, 391 Ill. App. 3d at 96-98, 908 N.E.2d at 552-553. (Pet. App. 13-16.)

Unlike the instant case, the property owners in *Webb's*, *Phillips* and *Brown* did not enter into

contractual relationships with the government and, in all of these cases, the government was obligated to return all of the property it was holding to the owners of that property. Here, Plaintiffs' bail bond contracts under Section 110-7 do not entail the State holding onto property belonging to the Plaintiffs. Thus, the interest earned on such property does not belong to Plaintiffs in the absence of a contractual right to such interest.

Webb's, *Phillips* and *Brown* are all factually dissimilar to this case, and therefore, this Court's reasoning in those cases is inapplicable here. In *Webb's*, for example, no contractual relationship existed between the county and the property owner. Rather, *Webb's* involved a county's taking as its own, under the authority of a Florida statute, the interest accruing on an interpleader fund deposited in the registry of a county court where the deposited fund was concededly private and was required by statute in order for the depositor to avail itself of statutory protection from the claims of creditors and others. *Webb's*, 449 U.S. at 159-165. Additionally, in *Phillips*, no contractual relationship existed between the parties, and this Court's holding was limited to its determination of the existence of a property interest in the interest accrued on client funds that lawyers were required to deposit in "interest on lawyers' trust accounts" ("IOLTA"). Finally, in *Brown*, no contractual relationship existed between the parties, and the case again involved a narrow issue concerning the state of Washington's IOLTA programs, which were established to pay for legal services for the needy. *Brown*, 538 U.S. at 240-241.

Likewise, the decision below does not conflict with *Henkels v. Sutherland*, 271 U.S. 298 (1926). (Petition at 12-14.) In *Henkels*, the United States seized common stock belonging to the plaintiff pursuant to the Trading with the Enemy Act (the "Act"). The United States then sold the stock and placed the proceeds in interest bearing government securities. A lower court ultimately determined that Henkels was not an alien but an American citizen and ruled under the Act that he was, therefore, the proper owner of the proceeds of the sale of his stock. This Court held that because Henkels was the owner of the stock, he was entitled not only to the proceeds of the sale of the stock but also to any interest earned on these proceeds. *Id.* at 301. *Henkels* is readily distinguishable from the present case and the decision below does not conflict with *Henkels*.

In *Henkels*, the ownership or property interest in the proceeds of the sale of the plaintiff's stock was determined as a matter of federal law under the Act. Based on this determination, the United States returned the proceeds from the sale of Henkels' property, and this Court found that the plaintiff was also the owner of the interest accrued on the proceeds. Here, under Illinois law, Plaintiffs had no continuing ownership interest in the bail bond funds or the interest accrued thereupon. *Turnipseed* does not conflict with *Henkels*, as the cases are factually distinguishable.

The decision below does not conflict with any decision of this Court and, on that basis, the Petition should be denied.

B. No Split Of Authority Exists Between The Courts Of Illinois, California and Montana Regarding An Issue Of Federal Law.
(Response to Petition at 18-20.)

While the facts in *Henkels*, *Webb's*, *Phillips* and *Brown* are markedly different from the present case, the case with the most similar fact pattern to the present case is *Overland v. Superior Court of Los Angeles County*, 126 Cal. App. 4th 131, 141, 23 Cal. Rptr. 3d 676, 683 (Cal. Ct. App. 2005), *cert. den.*, 126 S.Ct. 426 (2005). *Overland*, like the decision below, concluded that the bail bond agreement did not provide for interest that accrued on cash paid pursuant to the contract, that no property belonging to plaintiff was "taken" and that the plaintiff's claim under the Takings Clause was not viable. Just as *Turnipseed* was decided on a principle of Illinois law, *Overland* was decided on the basis of California law.

In *Overland*, the plaintiffs deposited cash bail to secure the appearance of individuals charged with criminal offenses. Upon the satisfaction of these bonds, the cash that was posted was returned to the plaintiffs. The plaintiffs then sought pre-exoneration interest on their cash bail deposits. The defendants refused to pay such interest. The *Overland* plaintiffs (like Plaintiffs here) then filed a lawsuit alleging that the defendants' refusal to pay such interest was an unconstitutional taking of the plaintiffs' property in violation of the Takings Clause.

Significantly, the *Overland* plaintiffs relied on the same cases that Plaintiffs cite in their Petition: *Phillips v. Washington Legal Foundation*, 524 U.S. 156

(1998) and *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980). Because the facts in *Phillips* and *Webb's* were inapplicable to the bail bond agreement in *Overland* (as well as the bond agreement here), the *Overland* court held that the plaintiffs' reliance on these cases was misplaced, stating that:

> Those cases involved the involuntary taking by the government of private property, i.e., interest earned on client funds deposited in IOLTA accounts, for public use, namely, to fund legal services for low income individuals. Those circumstances implicate the Fifth Amendment, which requires the payment of just compensation when private property is taken for public use. However, those constitutional concerns are absent here.
>
> The court defendants' refusal to pay petitioners interest on their cash bail deposits does not constitute a "taking" because there was no confiscation of private property by the court defendants for a public purpose, or at all. Rather, when petitioners voluntarily deposited cash bail to free the criminal defendants from custody, petitioners entered into contracts with the government by which petitioners guaranteed the appearance of the criminal defendants released on bail at all required court proceedings.

Overland, 126 Cal. App. 4th at 140, 23 Cal. Rptr. 3d at 683. The court found that "[a] bail transaction is a contract" and that this contractual obligation "is defined

by applicable statutory law and language of the bond itself." *Id.* 126 Cal. App. 4th at 141, 23 Cal. Rptr. 3d at 683. The court added that "[a]lthough the case law typically involves bail bonds, rather than cash bail deposits, that is a distinction without a difference for purposes of the discussion herein." *Id.*

In *Turnipseed* and *Overland* — the two cases in the United States that have considered whether a claim could be filed under the Takings Clause for interest that accrued on a bail bond where a bail bond contract did not provide for the payment of such interest — both courts reached the same conclusion: the parties' respective contracts precluded claims under the Takings Clause. Thus, in both *Turnipseed* and *Overland*, a determination of State law defeated Plaintiffs' federal constitutional claim.

Plaintiffs, however, argue that the decision below creates a conflict with the decision of the Montana Supreme Court in *Siroky v. Richland County*, 271 Mont. 67, 894 P.2d 309, 312-313 (Mont. 1995). *Siroky* held that a county's retention of the interest money on a bail bond cash deposit violates the due process and takings clauses of the Montana Constitution and the Takings Clause of the Fifth Amendment. (Petition at 18-20.) For two reasons, no such conflict exists.

First, the decision below that Plaintiffs had no property right taken was decided under Illinois law. *Siroky* itself acknowledged that "[p]roperty interests are created not by the constitution, but by independent sources such as state law." *Siroky*, 894 P.2d at 310. Neither the decision below nor *Overland* detracts from

the authority of the Montana Supreme Court to hold that a property right to interest on bail bonds exists under Montana law. A holding on what property rights State law creates cannot create a split of authority regarding an interpretation of federal law warranting review by this Court.

Second, in *Siroky*, the Montana Supreme Court did not even consider the contractual defenses common to *Overland* and the present case. In this regard, *Siroky* did not consider the contractual nature of the bail bond agreement and the defenses available under the contract (*i.e.*, the fact that no contractual provision provided for interest). Further, *Siroky* did not address the argument that Defendants raised here and the defendant raised in *Overland*: the refusal to pay interest on cash bail deposits does not constitute a "taking" because there was no confiscation of private property but rather a voluntary contractual agreement. *Siroky* did not acknowledge that the bail bond agreement is a contract. It would appear from *Siroky* that under Montana law, a bail bond is not considered a contract, or if it is, that an interest requirement is built into it. Montana has the ability to determine the parameters of its bail bond scheme but, in doing so, cannot create a conflict with other States' decisions on how to establish their bail bond practices.

Overland is the current law in California[9] regarding

9. Interestingly, *Siroky* distinguished Montana law from California law by noting disapproval of *Fresno Firefighters' Local 753 v. Jernagan*, 222 Cal. Rptr. 886, 177 Cal. App. 3d 403 (Cal. Ct. App. 1986), which held that "the *public purpose* of bail (Cont'd)

the viability of a claim under the Takings Clause for interest on bail bonds and is consistent with the principles of Illinois law set forth in *Rubright*, *Woollums*, *Gonzalez* and *Turnipseed*. Under Illinois and California law, persons who post bail bonds have no property right to interest accrued on the portion of bail funds returned to them. Any determination in *Siroky* that Montana law reaches a different result does not warrant review from this Court.

V. Perceived Misstatements Of Law And Fact In The Petition.

Pursuant to Supreme Court Rule 15(2), Defendants cite the following perceived misstatements of fact and law in the Petition:

In the Petition, Plaintiffs state that interest accrued on the bail bond deposit for named Plaintiffs Darniece Bailey Turnipseed and Raymond Thomas was transferred to Cook County at the time their bond was refunded. (Petition at 7-8.) This misstates the process by which interest on bail bond deposits is accrued and

---

(Cont'd)
justifies the denial to the owner of the beneficial use of the money while it is on deposit with the court." *Siroky*, 894 P.2d at 312. However, the *Overland* court also rejected the *Fresno* rationale and stated that "[t]he reason there is no right to pre-exoneration interest on cash bail is not that the money was deposited for a public purpose. Rather, no interest is owed because the bail deposit is made in accordance with the terms of a particular contract and the terms of that contract do not include a provision for pre-exoneration interest." *Overland*, 126 Cal. App. 4th at 142. *Siroky* never considered this argument.

processed. As an initial matter, no segregated amount of interest is transferred, or even identified, at the time any bond is refunded. All bail bond funds are deposited into a Cash Bond Control Account maintained by the Clerk. Interest accrued on all accounts maintained by the Clerk, including the Bond Account, is transferred to the Cook County Treasurer on a quarterly basis.

Furthermore, certain fees and charges are connected with the Bond Account, as set forth in Defendants' response to Plaintiffs' motion for class certification. After the fees attributable to the bond deposit, processing and refund were subtracted, the $100 bond deposited for two months on behalf of Darniece Bailey Turnipseed would not have earned any net interest. Thus, even under Plaintiffs' own theory, no just compensation would be due to the Turnipseeds and, accordingly, their rights under the Fifth and Fourteenth Amendments would not have not been violated. *See Brown v. Legal Foundation of Washington*, 538 U.S. 216, 240 (2002)(where no net interest would be earned on deposit to Interest on Lawyer Trust Accounts, no just compensation would be due and, therefore, there had been no violation of the Just Compensation Clause).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

ANITA ALVAREZ
Cook County State's Attorney
500 Richard J. Daley Center
Chicago, Illinois 60602
(312) 603-1840

Counsel for Respondents

PATRICK T. DRISCOLL, JR.
Deputy State's Attorney
Chief, Civil Actions Bureau

JEFFREY S. MCCUTCHAN
STEPHEN L. GARCIA
CATHERINE M. KELLY
PAUL A. CASTIGLIONE*
pcastig@cookcountygov.com
Assistant State's Attorneys
of Counsel

* *Counsel of Record*

(3)

No. 09-763

Supreme Court, U.S.
FILED
MAR 22 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

DARNIECE BAILEY TURNIPSEED,
RAMON TURNIPSEED, and RAYMOND THOMAS,
individually and on behalf of a class of
all others similarly situated,

Petitioners,

v.

DOROTHY BROWN, Clerk of the Circuit Court of
Cook County in her official capacity, and
THE COUNTY OF COOK,

Respondents.

On Petition For Writ Of Certiorari
To The Illinois Appellate Court

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

JOHN R. WYLIE
Counsel of Record
DONALDSON GUIN LLC
300 South Wacker Drive,
Suite 1700
Chicago, Illinois 60606
(312) 878-8391
Johnw@dglawfirm.com

CHARLES R. WATKINS
FUTTERMAN HOWARD ASHLEY
WATKINS & WELTMAN, P.C.
122 South Michigan Avenue,
Suite 1850
Chicago, Illinois 60603
(312) 427-3600

ARTHUR T. SUSMAN
MATTHEW T. HURST
GLENN L. HARA
SUSMAN HEFFNER &
HURST LLP
Two First National Plaza,
Suite 600
Chicago, Illinois 60603
(312) 346-3466

ELLIOT ZINGER
ELLIOT ZINGER & ASSOCIATES
10 South La Salle Street,
Suite 1420
Chicago, Illinois 60602
(312) 782-9464

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

REPLY BRIEF FOR PETITIONERS 1

I. THE ADEQUATE AND INDEPENDENT STATE GROUNDS DOCTRINE IS INAPPLICABLE AND SHOULD NOT AFFECT THIS COURT'S DECISION REGARDING CERTIORARI IN THIS MATTER 2

II. PETITIONERS HAVE NOT WAIVED THEIR DUE PROCESS ARGUMENT 6

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES:

A-1 Lithoplate, Inc. v. AFS Publ'g Co., 66 Ill. App. 3d 560, 384 N.E.2d 395 (Ill. App. Ct. 1978) 7

Broad River Power Co. v. South Carolina, 281 U.S. 537, 50 S. Ct. 401 (1930) 3

Brown v. Legal Found. of Wash., 538 U.S. 216, 123 S. Ct. 1406 (2003) 1

Coleman v. Thompson, 501 U.S. 722, 111 S. Ct. 2546 (1991) 3

Degen v. United States, 517 U.S. 820, 116 S. Ct. 1777 (1996) 8

Demorest v. City Bank Farmers Trust, 321 U.S. 36, 64 S. Ct. 384 (1944) 3

Halpin v. Schultz, 234 Ill. 2d 381, 917 N.E.2d 436 (Ill. 2009) 8

Henkels v. Sutherland, 271 U.S. 298, 46 S. Ct. 524 (1926) 1

Hughes v. Washington, 389 U.S. 290, 88 S. Ct. 438 (1967) 3, 6

In re Estate of Funk, 221 Ill. 2d 30, 849 N.E.2d 366 (Ill. 2006) 8

Lucas v. S.C. Coastal Council, 505 U.S. 1003, 112 S. Ct. 2886 (1992) 5

Morton Grove Park Dist. v. Am. Nat'l Bank & Trust Co., 78 Ill. 2d 353, 399 N.E.2d 1295 (Ill. 1980) 5

TABLE OF AUTHORITIES – Continued

Page

Phillips v. Wash. Legal Found., 524 U.S. 156, 118 S. Ct. 1925 (1998) 1, 6

Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 100 S. Ct. 2035 (1980) 4

Siroky v. Richland County, 271 Mont. 67, 894 P. 2d 309 (Mont. 1995) 2

Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 101 S. Ct. 446 (1980) 1, 3, 6

FEDERAL CONSTITUTIONAL PROVISIONS:

U.S. Const., Amend. V 4, 7

U.S. Const., Amend. XIV 4, 7

STATUTES AND ORDINANCES:

725 ILCS 5/110-7. ..... 7, 8

REPLY BRIEF FOR PETITIONERS

The major premise of Respondents' argument – that title to the bail bond deposits passes from the depositor to the Respondent clerk upon deposit – is false. As shown below, and explained in Petitioners' Petition for a Writ of Certiorari, Illinois law is clear that bail bond deposits remain private property unless and until forfeited by order of the court, or the court otherwise orders the use of the deposits to pay fines and other matters. (*See* Petition for Writ of Certiorari at 7-8.) Moreover, even if the parties created a contract upon the bail deposit, the trial court found that the clerk is not a party to that contract and the contract says nothing about Respondents' right to use Petitioners' and the Class members' private property without compensation. (App. 28.) The Illinois Appellate Court did not disturb these findings. As such, Respondents' contract-based arguments are red herrings. They do not undermine this Court's jurisdiction to hear and resolve this case, nor counsel that it should not do so.

Nothing in Respondents' Brief in Opposition refutes what Petitioners established in their Petition, that (1) the Illinois Appellate Court's decision conflicts with this Court's decisions in *Henkels v. Sutherland*, 271 U.S. 298, 46 S. Ct. 524 (1926); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 101 S. Ct. 446 (1980); *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 118 S. Ct. 1925 (1998); and *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 123 S. Ct. 1406

(2003); (2) the Illinois Appellate Court's decision also directly conflicts with the decision of the Montana Supreme Court in *Siroky v. Richland County*, 271 Mont. 67, 894 P. 2d 309 (Mont. 1995); (3) if allowed to stand, the Illinois Appellate Court's decision would sanction the automatic forfeiture of private property without due process, a practice repeatedly condemned by this Court; and (4) allowing the Illinois Appellate Court's ruling to stand would sanction the disturbing trend among states to use private property held only in custody to raise revenue for themselves, while sidestepping the constitutional requirement that they pay just compensation for that use.

As shown in Petitioners' Petition, this Court should issue a writ of certiorari to the Illinois Appellate Court, exercising its supervisory powers to review that court's decision in order to resolve the conflicts with decisions of this Court and the Montana Supreme Court, and to resolve the significant constitutional issues it presents.

I. THE ADEQUATE AND INDEPENDENT STATE GROUNDS DOCTRINE IS INAPPLICABLE AND SHOULD NOT AFFECT THIS COURT'S DECISION REGARDING CERTIORARI IN THIS MATTER.

The adequate and independent state grounds doctrine provides that the United States Supreme Court lacks jurisdiction to review a judgment of a state court that "rests on a state law ground that is

independent of the federal question and adequate to support the judgment." *Coleman v. Thompson,* 501 U.S. 722, 729, 111 S. Ct. 2546, 2553-54 (1991). As discussed, the state grounds proffered by Respondents here do not in fact exist.

Further, this Court has long recognized that even if a constitutional claim is rejected on non-federal grounds, "it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis." *Demorest v. City Bank Farmers Trust,* 321 U.S. 36, 42, 64 S. Ct. 384, 388 (1944); *Broad River Power Co. v. South Carolina,* 281 U.S. 537, 540, 50 S. Ct. 401, 402 (1930).

So although Respondents correctly note that property interests are often created and defined by state law, *see Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161, 101 S. Ct. 446, 451 (1980), states may not "defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all," *Hughes v. Washington,* 389 U.S. 290, 296-97, 88 S. Ct. 438, 442 (1967) (Stewart, J., concurring). This Court made that clear in *Webb's*, in which it held that a state court could not redefine established private property rights as "public property" so as to avoid a constitutional takings claim. 449 U.S. at 164, 101 S. Ct. at 452 ("Neither the Florida Legislature by statute, nor the Florida courts by judicial decree, may accomplish [a taking] simply by recharacterizing the principal as "public money.").

In other words, private property is not an infinitely elastic concept that states are free to redefine as suits their will. *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 93, 100 S. Ct. 2035, 2047 (1980) (Marshall, J., concurring) ("I do not understand the Court to suggest that rights of property are to be defined solely by state law, or that there is no federal constitutional barrier to the abrogation of common-law rights by Congress or a state government. The constitutional terms 'life, liberty, and property' do not derive their meaning solely from the provisions of positive law.").

In the opinion below, however, the Illinois Appellate Court did exactly that: in a dramatic departure from its long-established rule that "interest follows principal," the Appellate Court simply eliminated an established private property right, and based thereon, concluded no compensation was due. The court held that Petitioners did not state a valid claim for interest because (1) Petitioners had no common law right to recover interest and (2) the silence of the bail bond statute with regard to interest indicated that the legislature did not provide Petitioners with a statutory right to it. (App. 21-22.) That decision, however, ignores well-established Illinois precedent that entitles Petitioners to the interest earned on their bail bond deposits, the taking of which is a violation of the Takings Clauses of the Fifth and Fourteenth Amendments. Respondents' refusal to acknowledge this precedent should not be the basis for denying certiorari.

Illinois courts have long recognized that interest is a private property right protected by the Constitution. In *Morton Grove Park Dist. v. Am. Nat'l Bank & Trust Co.*, 78 Ill. 2d 353, 362, 399 N.E.2d 1295, 1299 (Ill. 1980), for example, the Illinois Supreme Court specifically defined "property," as "every interest anyone may have in any and everything which is the subject of ownership, together with the right to possess, use, enjoy and dispose of the same." From that broad definition of "property," the court held:

> The earnings on the funds deposited are a mere incident of ownership of the fund itself. The "taking clause" provision [of the United States and Illinois Constitutions] applies to the earnings in the same manner, and with the same force, as it applies to the principal.

Morton Grove, 78 Ill. 2d at 362-63; 399 N.E.2d at 1299. Therefore, the court held, "[t]he use of the award money by the county treasurer, to earn interest which is not paid to the owner but to the county, is clearly a taking of private property for public use." *Id.*, 78 Ill. 2d at 362, 399 N.E.2d at 1299.

Thus, under Illinois law (1) the bail bond deposit remains private property, and (2) the interest earned on that private property is also private property. There is no adequate and independent state ground that would affect this Court's jurisdiction.

Moreover, while state courts do have latitude to overrule their own precedents, including those related to property rights, *Lucas v. S.C. Coastal Council*, 505

U.S. 1003, 1035, 112 S. Ct. 2886, 2903 (1992) ("The Takings Clause does not require a static body of state property law.") (Kennedy, J., concurring), that latitude is not a boundless license to sanction an uncompensated taking, *Hughes*, 389 U.S. at 296, 88 S. Ct. at 442 (Stewart, J., concurring) ("To the extent that the decision of the Supreme Court of Washington on that issue arguably conforms to reasonable expectations, we must of course accept it as conclusive. But to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate.").

Here, the Illinois Appellate Court departed abruptly from clear precedent and eliminated a well-established property right. Consistent with this Court's long history of reviewing and reversing court decisions that change or eliminate constitutionally protected interests, that state court decision is not protected from review by the adequate and independent state grounds doctrine. *See, e.g., Phillips v. Wash. Legal Found.*, 524 U.S. 156, 118 S. Ct. 1925 (1998); *Webb's*, 449 U.S. 155, 101 S. Ct. 446.

II. PETITIONERS HAVE NOT WAIVED THEIR DUE PROCESS ARGUMENT.

The Illinois Appellate Court's decision makes the forfeiture of the earnings on an owner's property immediate and without recourse, essentially conditioning the exercise of one's constitutional right to bail on the sacrifice of one's property rights. This

immediate forfeiture violates the Due Process Clauses of the Fifth and Fourteenth Amendments, and is at odds with the Illinois bail bond statute's express reference to a bond as a "deposit" that can be "forfeited" only by order of a court. 725 ILCS 5/110-7(a), (f) & (g). Illinois courts have long viewed Respondents as mere custodians of the deposit. *A-1 Lithoplate, Inc. v. AFS Publ'g Co.*, 66 Ill. App. 3d 560, 562, 384 N.E.2d 395, 396 (Ill. App. Ct. 1978) ("Our view is that bail bond money held by a circuit court clerk, like any money held by any judicial officer in his official capacity, is in the custody of the law."). Now, under the Illinois Appellate Court's decision, Respondents take immediate title to the deposits without proceeding through the judicial process established by statute for forfeiture. What was once an established judicial procedure that afforded due process has now been rendered completely vestigial.

Petitioners did not waive the due process argument. Rather, at every turn in this litigation, Petitioners have argued that depositors have a constitutionally protected interest in their deposits until a court, after appropriate procedures, orders to the contrary. (App. 14.) The Illinois Appellate Court's decision mandates the immediate forfeiture of the earnings on private property upon deposit without any recourse and in excess of any legitimate administrative costs.[1] 725 ILCS 5/110-7(f) (10% of deposit is retained for "bail costs"). This violates this Court's

[1] Petitioners do not contest these costs.

admonishment that "a citizen has a right to contest the forfeiture of his property, a right secured by the Due Process Clause." *Degen v. United States*, 517 U.S. 820, 822, 116 S. Ct. 1777, 1780 (1996).

Contrary to Respondents' assertion, there was no need to raise the due process argument in the proceedings below. From the face of the statute, the deposits have always remained the property of the owner. The only exception is when there is a court order forfeiting some or all of the bond. 725 ILCS 5/110-7(a), (f) & (g). The decision of the Illinois Appellate Court raises due process concerns for the first time, ones that Petitioners did not know about, and could not have known about, prior to the decision. If the forfeiture of all property rights ceases upon posting bail, then the forfeiture proceedings – which the Appellate Court ignored – required by the statute are completely superfluous.

Even if Petitioners could have raised their due process argument earlier, this Court may still consider it now. Illinois courts view waiver as "an admonition to the parties, rather than a limitation on a court of review." *Halpin v. Schultz*, 234 Ill. 2d 381, 390, 917 N.E.2d 436, 442 (Ill. 2009). A reviewing court may consider any issue "in order to maintain a sound and uniform body of precedent or where the interests of justice so require." *Id.* (citing *In re Estate of Funk*, 221 Ill. 2d 30, 97, 849 N.E.2d 366, 403 (Ill. 2006)). Both considerations apply to this petition. The need to maintain a uniform body of law governing the taking of incidents of ownership, as well as the need

to ensure that private property rights are not procedurally circumscribed, warrants consideration of all the issues in this case.

CONCLUSION

For the reasons set forth above, Petitioners pray that the Court grant a writ of certiorari to review the decision and judgment of the Illinois Appellate Court.

Respectfully submitted,

JOHN R. WYLIE
Counsel of Record
DONALDSON GUIN LLC
300 South Wacker Drive,
Suite 1700
Chicago, Illinois 60606
(312) 878-8391
Johnw@dglawfirm.com

ARTHUR T. SUSMAN
MATTHEW T. HURST
GLENN L. HARA
SUSMAN HEFFNER & HURST LLP
Two First National Plaza,
Suite 600
Chicago, Illinois 60603
(312) 346-3466

CHARLES R. WATKINS
FUTTERMAN HOWARD ASHLEY
WATKINS & WELTMAN, P.C.
122 South Michigan Avenue,
Suite 1850
Chicago, Illinois 60603
(312) 427-3600

ELLIOT ZINGER
ELLIOT ZINGER & ASSOCIATES
10 South La Salle Street,
Suite 1420
Chicago, Illinois 60602
(312) 782-9464